IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 38/12

In the matter between

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

and

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

FIRST TO FOURTH RESPONDENTS' GROUNDS FOR OPPOSING THE APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

MARC CORCORAN

do hereby make oath and state that:

1 I am a major male member of the National Executive Committee of the Second Applicant currently residing at 6 Topaz, Lincoln Road, Khyber Rock.

2 I am duly authorised to oppose this application for leave to appeal and to depose to this affidavit on behalf of the First to Fourth Respondents.

3 The facts contained herein are to the best of my knowledge and belief, both true and correct and, unless otherwise stated or the contrary appears from the context, within my own personal knowledge. Where I rely on information conveyed to me by others, I attach confirmatory affidavits. Where I make submissions of a legal nature herein, I do so on the advice of the First to Fourth Respondents' legal representatives.

4 Where I deal with allegations specific to the field of economics and public finance, I do so on the advice of the following experts:

4.1 Dr Azar Jammine, Director and Chief Economist at Econometrix (Pty) Ltd; and

4.2 Christopher Hart, Economist and Chief Strategist at Investment Solutions.

5 The confirmatory affidavits of the above experts are attached.

6 I depose to this affidavit in answer to the founding affidavit of the Honourable Minister of Finance Pravin Gordhan and the supporting affidavit of Nazir Alli filed by the applicants in support of the application for leave to appeal directly to the Constitutional Court ("the present application" or "the application for leave to appeal").

7 In so doing, I shall deal only with those allegations that I am advised require a specific response. To the extent that I do not deal with any specific allegation, such allegation is denied insofar as it is inconsistent with what I have stated elsewhere in this affidavit.

8 For the sake of convenience, I shall refer in this affidavit to:

8.1 the First Applicant as "Treasury";

8.2 the Second Applicant as "SANRAL";

8.3 the Third Applicant as "the Minister of Transport";

8.4 the Fourth Applicant as "the MEC";

8.5 the Fifth Applicant as "the Minister of Environmental Affairs";

8.6 the Sixth Applicant as “the Director-General”; and

8.7 the First to Sixth Applicants collectively as “the Applicants”.

9 I shall for the same reason refer in this affidavit to:

9.1 the First Respondent by its abbreviated name “OUTA”;

9.2 the Second Respondent by its abbreviated name “SAVRALA”;

9.3 the Third Respondent by its abbreviated name "QASA”;

9.4 the Fourth Respondent by its abbreviated name “SANCU”; and

9.5 the First to Fourth Respondents collectively as “the OUTA Respondents”.

A. FACTUAL BACKGROUND

10 The proposed e-tolling of the Gauteng freeway network has been a matter of major public interest and controversy since the publication of the tariffs and intended date of commencement of tolling on 4 February 2011. The scale of the public outcry and opposition demonstrates the extent to which this issue has stirred up anger amongst South Africans of all walks of life.

11 The Gauteng Freeway Improvement Project (“GFIP”) Steering Committee hearings held from March to June 2011 saw the broadest range of private

stakeholders, political parties and organisations either voicing criticism or outright opposition to:

11.1 the exorbitant cost of the tariffs; and

11.2 the choice of e-tolling as a funding mechanism to recoup the funds spent by SANRAL in upgrading and expanding the arterial network on which approximately 1 million road-users in Gauteng depend daily.

12 The Steering Committee hearings saw political opponents such as the South African Communist Party and ANC Youth League on the one hand and the Freedom Front Plus and on the other, united in opposing e-tolling. The Congress of South African Trade Unions ("COSATU") together with the Democratic Alliance decried the lack of viable public transport alternatives. They expressed concern about the impact of e-tolling on the poor and a need for proper consultation and transparency.

13 The hearings also saw many private and civil society organisations and stakeholders voicing opposition to e-tolling, objecting to the lack of transparency on the part of SANRAL and the absence of proper consultation prior to the choice of e-tolling having been made. Numbered amongst these were Business Unity South Africa ("BUSA"), the Automobile Association ("the AA"), Afriforum, SAVRALA, Retail Motor Industries, SATSA, the Johannesburg Chamber of Business, the South African Local Government Association, the South African Bus Operators Association ("SABOA"), the National Taxi

Alliance, Mamelodi Commuter Forum, the South African Commuters Organisation and Ekurhuleni Municipality.

14 Almost all of these organisations voiced their opposition at the Steering Committee hearings for the first time because the notice and comment procedures followed by SANRAL in October 2007 and April 2008 had been woefully inadequate in drawing the public's attention to the intention of SANRAL to toll and informing the public of the material impact the Gauteng freeway network would have on them. Unfortunately, these representations were made at a time when the minds of SANRAL and the Department of Transport proved in retrospect to be closed to a reconsideration of e-tolling.

15 By February 2012, the commencement date of tolling had been postponed no fewer than four times, as I detail in paragraphs 42 to 53 below, and uncertainty about the fate of tolling abounded.

16 It was in this context that the Minister of Finance finally announced that e-tolling would definitely go ahead in the budget speech on 22 February 2012. The OUTA Respondents then launched their review application. The budget speech had finally put an end to a year of uncertainty regarding whether e-tolling would commence at all. This was a year in which the Department of Transport had to clarify on no fewer than two occasions that e-tolling would commence because the public had been led to believe that e-tolling was not proceeding. The public had formed this view after

16.1 a statement by the Minister of Transport in October 2011; and

16.2 the postponement of e-tolling in January 2012 for meetings between the Minister and SANRAL, Government and COSATU.

17 The application was launched on 23 March 2012 and was made in two parts:

17.1 In Part A, the OUTA Respondents sought interim interdictory relief to prevent the unlawful levying and collection of tolling of the proposed toll road network pending the determination of Part B.

17.2 In Part B, the OUTA Respondents sought orders reviewing and setting aside

17.2.1 the series of declarations by SANRAL of the relevant sections of the proposed toll road network as toll roads together with the respective approvals by the Minister of Transport that such declarations be made; and

17.2.2 the series of environmental authorisations obtained by SANRAL. These were a precondition for the upgrading and extension of the proposed toll roads for the purposes of establishing a toll road network which complied with the law.

18 At the time when the application was launched, the tariff determinations by the Minister of Transport had not yet been published. They were eventually published on 13 April 2012 – only two weeks before e-tolling was set to

commence. The OUTA Respondents applied for leave to amend their Notice of Motion at the hearing of the application so as to review and set aside the tariff determinations. However, they were denied leave by His Lordship Mr Justice Prinsloo ("Prinsloo J") who found that the applicants had not had sufficient time to answer the OUTA Respondents' case in this regard.

19 The application for interim relief pending the review was brought in order to preserve the *status quo* and to

19.1 prevent the OUTA Respondents and hundreds of thousands of Gauteng road-users from being forced to pay tolls daily in terms of an unlawful and unconstitutional tolling scheme;

19.2 protect the members of QASA and persons in low income groups and disenfranchised members of the public, in particular, who are unable to pay the additional cost of e-tolling, from suffering immediate prejudice and from having to pay e-toll where (as with other road users) there is no real prospect of the recovery of such monies should the review succeed;

19.3 prevent the OUTA Respondents and Gauteng road users from being irremediably prejudiced in the application for review by the commencement of e-tolling which would, in all likelihood, be determinative of the outcome in the review and render it academic.

20 The application was set down for hearing on 24 April 2012 with a view to enabling SANRAL, the Minister of Transport and the other respondents in the High Court application sufficient time to deal with the application. In the event, SANRAL took 21 days and filed a 311-page answering affidavit (excluding annexures). The Minister of Transport took 19 days to file a 37-page affidavit (excluding annexures).

21 The fifth and sixth applicants did not file answering affidavits in the High Court proceedings. They were represented by counsel who stated on record that he was on a "watching brief". It therefore comes as a considerable surprise to learn that the fifth and sixth applicants seek leave to appeal against the order of the High Court.

22 After hearing extensive argument which commenced on Tuesday 24 April 2012, the High Court ruled that the matter was urgent. The Applicants do not (nor I am advised could they) seek to appeal the decision of Prinsloo J declining to strike the matter from the roll on the grounds of lack of urgency. I am advised that it is therefore unnecessary to deal further with the question of urgency before the High Court.

23 After hearing full argument on the merits until about 16h20 on Thursday 26 April 2012, the High Court reserved judgment. It indicated that it would deliver its judgment on Saturday 28 April 2012.

24 I was present at the High Court on the afternoon on Thursday 26 April 2012. After argument was concluded at 16h20 and the court adjourned, I was astonished then to learn from journalists who were present that the ANC and COSATU had announced in the hour before the Court rose that e-tolling would be postponed for a month in order for a task team to investigate alternative funding mechanisms. This was despite the arguments presented in Court on that day on behalf of the SANRAL and the Treasury that any postponement of e-tolling would be calamitous. The postponement of e-tolling announced by the ANC and COSATU was confirmed later that evening by SANRAL and the Minister of Transport. I describe this remarkable turn of events in more detail below.

25 On Saturday 28 April 2012, the High Court granted an order interdicting SANRAL from levying and collecting toll on the proposed toll road network pending the finalisation of the review.

B. GROUNDS FOR OPPOSING THE APPLICATION FOR LEAVE TO APPEAL

26 I am advised that the question whether leave to appeal ought to be granted by this Court engages two questions:

26.1 whether the application for leave to appeal raises a constitutional matter.

26.2 whether it would be in the interests of justice to grant leave to appeal.

27 I address each of these topics below.

CONSTITUTIONAL MATTER

28 The OUTA Respondents accept that a constitutional issue is raised by the application for leave to appeal. However, they dispute the reasons advanced by the applicants for this contention:

28.1 The applicants, correctly, point out that the OUTA Respondents filed a rule 16A notice in the High Court identifying the constitutional issues raised by the review application (in paragraph 23 of the founding affidavit of Pravin Gordhan). A copy of the rule 16A notice is attached to the application for leave to appeal.

28.2 For the reasons set out in the notice, the OUTA Respondents accept that the application raises a constitutional matter.

28.3 However, the applicants also characterise the constitutional matter as raising a "fundamental issue regarding the separation of powers and whether or not a court . . . can exercise discretionary judgment over governmental policy decisions on appropriate funding mechanisms, revenue sources, and the allocation of nationally raised revenue" (Gordhan paragraph 27).

28.4 For the reasons set out from paragraph 31 below, the OUTA Respondents contest this description of the application. It is an attempt to characterise this matter to bring it within the types of case in respect

of which this Court has previously granted leave to appeal. As demonstrated below, this characterisation is inaccurate.

THE INTERESTS OF JUSTICE

29 I am advised that the following factors are relevant to an assessment of whether it would be in the interests of justice to grant leave to appeal:

29.1 The kind and importance of the constitutional issue raised;

29.2 Whether the decision, although interlocutory, has final effect;

29.3 Whether irreparable harm will result if leave to appeal is not granted; and

29.4 Whether there are prospects of success.

30 I shall deal with each of these issues in turn.

Nature and importance of the constitutional issue raised

31 The applicants contend that the constitutional issue raised in this case is "whether or not a Court … can exercise discretionary judgment over governmental policy decisions on appropriate funding mechanisms, revenue sources, and the allocation of nationally raised revenue" (Gordhan paragraph 27). The applicants state that the OUTA Respondents sought "a directive by the Court, cutting across a decision by Government of several

years' standing and a sequence of Ministerial and other decisions, regarding what the Court may consider to be a more efficient and transparent way of collecting revenue and paying for infrastructure." They argue that "such an intervention in public finance is both unprecedented and in fundamental breach of the division of powers" (Gordhan paragraph 29.5.3), and that "the High Court is de facto and on an interim basis administering a crucial aspect of government of policy in the form of the revenue procurement and allocation" (Gordhan paragraph 72).

32 The applicants have, with respect, fundamentally mischaracterised the nature of this case in their application for leave to appeal. The application before Prinsloo J engaged the separation of powers no more than any application for an interim interdict pending a review:

32.1 The applicants seek to suggest that the review application is directed at setting aside the decision of government to implement the "user-pay principle". However, this is manifestly incorrect. Prayer B1 of the notice of motion seeks to review SANRAL's decision to declare certain roads as toll roads. Prayer B3 of the notice of motion seeks to review decisions to grant environmental authorisations in terms of section 24 of NEMA;

32.2 The applicants have tried to fashion their leave application in a way which allows them to argue that the present case is analogous to *International Trade Administration Commission v SCAW South Africa*

(Pty) Ltd and others 2010 (5) BCLR (CC) (referred to in what follows as "*ITAC v SCAW*"). However, that case is entirely distinguishable:

32.2.1 The constitutional issue raised by ITAC was unique. Never before had the Court considered the effect of the legislative regime at issue in that case. The question of the proper interpretation thereof was finally determined by the High Court judgment. That court's reasoning on the effect of judicial review on the duration of anti-dumping orders would not have been revisited in the review;

32.2.2 There were two layers at which the separation of powers was engaged in ITAC. First, the whole premise of the anti-dumping regime in international law is that a specialist body with particular expertise must be the one to conduct an investigation into anti-dumping measures. The effect of the High Court's order was to extend an anti-dumping measure without this investigation having been performed and in circumstances where the court was ill-equipped to conduct the investigation itself. Secondly, the Minister's decision had polycentric attributes of its own. It had to engage diplomatic relationships, as well as regional and global trading conditions. The High Court interdicted the Minister from making a particular decision on the basis that there was a *prima facie* prospect of reviewing ITAC's decision – even

though the Minister had to make an assessment independent of ITAC's recommendation;

32.2.3 The case confronted two possible interpretations of the relevant legislative framework dealing with anti-dumping measures, which emerged from the High Court's order. The court did not make a *prima facie* determination of the proper interpretation of the legislative framework, it made a final determination, which influenced its decision. The two possible interpretations engaged important constitutional imperatives. The High Court's order was based on the premise that the domestic right to judicial review (as reflected, at its highest, in s 33 of the Constitution) would be thwarted by an interpretation that brought the anti-dumping measure to an end, while a review of ITAC's decisions in the investigation was pending. This Court's order was based on the premise that the domestic right to judicial review would not be limited on the approach favoured by it, and that the important need to respect the international-trade position and the separation of powers required its approach to be adopted;

32.2.4 In so far as the separation of powers is concerned: an additional feature is that the High Court elevated the importance of ITAC's recommendation to the point that it interdicted the Minister from exercising his discretion. This Court considered this to constitute too great an interference

> into the domain of another branch of government. It could have been that the Minister would disagree with ITAC and decide to persist in the anti-dumping measure. He could also have required further investigations. He would have made such decisions from his position of expertise, steeped in the relevant issues (such as diplomatic relations, trade implications and the like). It would have been one thing granting some sort of order dealing with implementation, after the Minister had made his decision. But making it before he had even applied his mind, went too far;

32.3 None of these features is present in this case. The order of Prinsloo J is, in substance, no different to any other order restraining the implementation of a decision pending the finalisation of a review. The notion that a court making an interim order – pending a final determination whether a government decision was reasonable – is overstepping the bounds of the separation of powers has been rejected by this Court in *Minister of Health and others v Treatment Action Campaign and others (no 1)* 2002 (5) SA 703 (CC) at para 20. That decision concerned an execution order pending a determination whether government's policy regarding the provision of Nevirapine to mothers and their newborn babies was unreasonable and in conflict with section 27(1) of the Constitution. The reasoning applies with equal force to an interim order pending a review, inter alia, in terms of section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

33 In short, the applicants seek to characterise this case as involving a debate about the limits of judicial power and the separation of powers, in order to suggest that the type and importance of the constitutional matter warrants the granting of leave to appeal. I respectfully submit that this involves a mischaracterisation. As I shall indicate below, the main review is no different to scores of other reviews under PAJA. A court considering an appeal against Prinsloo J's judgment, therefore, will simply be considering whether the four elements of an interim interdict were met when he made his order. It is not in the interests of justice for this Court to grant leave to appeal to address that issue for the reasons given in *ITAC No 1* (supra) at paragraphs 5, 8, 9, 11 and 12 of the judgment.

Whether the decision has final effect

34 In *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC), this Court held that the word "*decision*" in Rule 18 should not be given a meaning equivalent to the meaning given to the words "*judgment or order*" in section 20(1) of the Supreme Court Act (para 8). It held that the question whether an appeal lies to this Court depends on whether the decision of the court a quo deals with a "constitutional matter" and, if it does, whether it is in the interests of justice for this Court to hear the appeal (para 7). These principles were reiterated in *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) and in *Machele and others v Mailula and others* [2009] ZACC 7 (CC).

35 Although it is not a jurisdictional requirement for an appeal to this Court that the matter must necessarily involve a "*judgment or order*" within the meaning of section 20(1) of the Supreme Court Act, the policy considerations that animate the SCA jurisprudence are nevertheless relevant to an assessment of the "interests of justice":

35.1 In *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 8, this Court made the point as follows:

> *"All the considerations which have led the Supreme Court of Appeal to adopt a limited interpretation of the words 'judgment or order' as contemplated by s 20 of the Supreme Court Act can be accommodated in the 'interests of justice' criterion. Thus, it will often not be in the interests of justice for this Court to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties*." (emphasis added)

35.2 The point was reiterated in *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) para 8:

> *"The policy considerations that underlie the non-appealability of interim execution orders in terms of section 20 of the Supreme Court Act, are also relevant to the decision whether it is in the interests of justice to grant an application for leave to appeal to this Court against an interim execution order."*

36 In the present circumstances, the High Court order has (in the language of *Khumalo*) "*no final effect on the dispute between the parties*". Not one of the present applicants argued before the High Court that the interim interdict which was sought amounted to final relief requiring the OUTA Respondents to make out a clear right rather than a prima facie right. SANRAL had advanced this contention in its answering affidavit, but did not persist with it in its heads of

argument or in oral argument. The other applicants did not raise the point at all.

37 Significantly, in their application seeking leave to appeal to this Court the applicants do not suggest that the order of the High Court has final effect. They merely contend that "the interdict … has the immediate and definite consequence of prohibiting SANRAL from discharging its obligations to maintain financial discipline" (Gordhan para 71). But any interim interdict against the state necessarily restrains the state from performing some or other function during the period of the interdict (quite apart from the fact that this statement is factually unsound). If the applicants' contention were correct, the grant of any interim interdict would be appealable to this Court.

38 I respectfully submit that it would not be in the interests of justice for this Court to grant leave to appeal against the grant of an interim interdict that is not finally dispositive of the issues in dispute. The question before the reviewing court will be whether the decisions to declare the roads as toll roads and to grant environmental authorisations were lawful. If the reviewing court finds reviewable irregularities, e-tolling will not be able to proceed (either temporarily or permanently, depending on the basis of the decision). If it does not, then e-tolling may proceed. The reviewing court will, to a large extent, be revisiting the substance of Prinsloo J's order.

39 The mere fact that there may be a delay before the review is finalised, cannot in itself render the interim order final in effect:

39.1 The applicants make much of the fact that there is likely to be a significant delay, on their version, before the review is finalised (in particular, Gordhan paragraph 8).

39.2 However, on the applicants' own version, the review could possibly be determined by August or September of this year, a mere month or two after this Court is being asked to hear the matter on the grounds of exceptional circumstances.

39.3 In *ITAC No 1* (supra), one of the considerations against allowing appeals against interim orders was that, if circumstances changed, the aggrieved party would be free to approach the court again, for a variation of the original interim order. By parity of reasoning, I respectfully submit that this Court should not grant leave to appeal in circumstances where an application in terms of rule 49(11) is sufficient to protect the applicants' interests.

Irreparable harm to the applicants

40 The applicants rely on the following allegations as the basis for arguing that they will suffer irreparable harm if leave to appeal is not granted by this Court:

40.1 The delay in the implementation of the toll roads has already cost SANRAL R2.7 billion (presumably since June 2011), which is 40 percent of the 2012 toll revenue budget (Gordhan paragraph 39).

40.2 The monthly cost of running the GFIP is R601 million, which will rapidly erode the R5.75 billion extraordinary appropriation made to SANRAL by the Government (Gordhan paragraph 39).

40.3 Moody's has downgraded SANRAL's rating (Gordhan paragraphs 40 and 41).

40.4 The suspension of tolling as a result of the interdict could be interpreted as an event of default under SANRAL's domestic medium term note programme. The consequence of this is that half of SANRAL's total GFIP debt, which equates to approximately R21 billion, would then immediately become due and payable. This, in turn, has dissuaded investors from purchasing SANRAL bonds which may lead to an expectation that government will settle the total debt of SANRAL amounting to R37.5 billion (Gordhan paragraphs 41-44).

40.5 The Auditor-General has warned SANRAL that he might have to issue a disclaimer by 31 July 2012 which would, in all likelihood, result in a further downgrade by ratings agencies (Gordhan paragraph 46).

40.6 As a consequence of SANRAL's default, the government will have to support the R14.1 billion of SANRAL's unsecured debt. This will affect SANRAL's credit rating in the money markets as well as the credit rating of the government. In so far as the latter is concerned, this will affect government's ability to finance important social programmes (Gordhan paragraphs 47-48 and 56).

40.7 The precedent set by the High Court's order will impact negatively on other state-owned entities which stand the real risk of having their wide-scale infrastructural projects annulled by any litigant "who seeks to sever the project's financial sustainability by court interdict" (Gordhan paragraph 57).

40.8 The interdict will impact indirectly on other government projects because the fiscus will, in perpetuity, have less revenue to allocate to other pressing social and economic priorities (Gordhan paragraph 59).

41 For the reasons that follow, these allegations are without merit.

The decision to suspend e-tolling on 26 April 2012

42 The entire premise of the applicants' case regarding irreparable harm is that the order of Prinsloo J is causing great prejudice and irreparable harm because of the delays in the implementation of e-tolling. However, this conveniently overlooks not only the four postponements which took place before OUTA's application, but also the further fact that the Minister of Transport himself announced a postponement of e-tolling on the evening after argument had been concluded before the High Court and before judgment was handed down (a remarkable turn of events which flew directly in the face of the strenuous arguments against postponement made by SANRAL and Treasury that very day in Court).

43 The first postponement of the commencement of e-tolling was from April 2011 to 23 June 2011. The reason for the postponement was, according to GFIP project manager Mr Alex van Niekerk in OUTA's papers before the High Court, in order that the e-toll system undergo further tests before going live.

44 The second postponement of e-tolling was from 23 June 2011 to an indefinite date. The ostensible reason for this postponement was the massive public outcry following the publication of the toll tariffs on 4 February 2011. However, SANRAL was in actual fact not ready. In a Beeld article referred to in the papers before the High Court, GFIP project manager Alex van Niekerk is reported as stating that the building work for GFIP was not yet complete and that e-tolling would commence after such building work had been completed in about November 2011.

45 SANRAL announced the third postponement of e-tolling from November 2011 to February 2012 (as was admitted in the answering affidavit filed by the applicants in the High Court). A statement to this effect was issued following the finalisation of the GFIP Steering Committee process; that is, not in order that further consultation could take place.

46 The fourth postponement of e-tolling was announced on 13 January 2012. This postponement was initially indefinite. The public was informed that the Minister of Transport was holding talks with the new SANRAL board, COSATU and within government. The ostensible purpose was to allow for further consultation and engagement.

47 After these various postponements, on 22 February 2012 it was announced by the Minister of Finance that e-tolling would commence on 30 April 2012.

48 In the affidavits before the High Court, SANRAL and the Minister of Transport, supported by National Treasury, said pointedly that tolling could under no circumstances be postponed again. However, neither SANRAL, nor the Minister of Transport, nor National Treasury placed any evidence before the High Court to distinguish the previous instances where the commencement of e-tolling had been postponed at will from the situation at the time the application was argued. No explanation was given of why, suddenly, another postponement would cause irreparable harm when it had not done so in the past.

49 Nonetheless, it was argued strenuously on behalf of SANRAL, the Minister of Transport and Treasury during the course of 26 April 2012 that e-tolling could under no circumstances be postponed and that it simply had to commence on 30 April 2012. The OUTA Respondents, and those who had witnessed the proceedings, were therefore astounded when, within minutes of the hearing been adjourned on 26 April 2012, they were informed that the ANC and COSATU had announced that e-tolling would be postponed for a month in order for a task team to investigate alternative funding mechanisms.

50 The postponement of e-tolling announced by the ANC and COSATU that afternoon was confirmed later that evening by SANRAL and the Minister of Transport. The Director-General for the Department of Transport, Mr George

Mahlalela, issued a public statement confirming that the commencement of e-tolling would be postponed for one month until the beginning of June 2012. The reasons given by Mahlalela on behalf of the Department of Transport were that the postponement was necessary "to finalise regulations following input on regulatory and administrative issues from the public and interested stakeholders".

51 In the three days of argument before the High Court it was never suggested by any of the applicants that a postponement was necessary for the reasons later given by Mahlalela. It appears that the real reason for the postponement was political expediency. It is clear is that the submissions made by SANRAL, the Minister of Transport and National Treasury to the High Court on 26 April 2012 to the effect that e-tolling could not be delayed under any circumstances, were belied by the fact that, at the very time when those submissions were being made, a deal was being struck between the ANC and COSATU to postpone the commencement of e-tolling which was later endorsed by the Minister of Transport.

52 The end result was this: by the time that the High Court handed down its judgment on Saturday 28 April 2012, the commencement of e-tolling had already been postponed by the Minister of Transport. As Mr Gordhan accepts in paragraph 80 of his founding affidavit, the decision to delay the postponement of e-tolling operated “independently of the High Court’s order”. I reiterate that the commencement of e-tolling had been postponed by the

Minister of Transport, notwithstanding repeated submissions to the High Court that postponement was unthinkable.

53 All of this is reflected in the Moody's document which is annexure "FA5" to the affidavit of Mr Gordhan. The document records that the High Court interdict "supersedes the South African government's decision to postpone e-toll collections by one month on 26 April 2012 and adds uncertainty on the future of the controversial toll road project". Remarkably, the founding affidavit of Mr Gordhan chooses to ignore the role of the government's decision to delay the commencement of e-tolling on Moody's decision to downgrade SANRAL's rating. In this regard, I refer to an article which appeared in the *Business Day* newspaper on 17 May 2012, entitled "E-tolling saga harmed policy predictability, says Moody's". It is attached here as "**OUTA1**". The article refers to a view expressed by Moody's lead analyst on South Africa that the negative outlook given to South Africa's credit rating arose from the fact that populism is having the effect of pressuring the state into changing its policy. Lack of predictability in government policy, therefore, is to blame for the negative outlook.

<u>SANRAL was not ready to commence e-tolling on 30 April 2012 and is still not ready to commence e-tolling</u>

54 In paragraph 81 of his founding affidavit, Mr Gordhan states enigmatically that the postponement of e-tolling on 26 April 2012 "was decided in order for a process of consultation to be embarked upon to finalise regulations following

input on regulatory and administrative issues arising from the public and interested stakeholders". The only thing that is clear from this statement is that SANRAL was not ready to commence e-tolling on 30 April 2012. This is entirely at odds with the case that had been presented to the High Court by SANRAL, the Minister of Transport and National Treasury.

55 Indeed, it is clear from Mr Gordhan's founding affidavit that SANRAL is still not ready to commence e-tolling. This is because Mr Gordhan now states that the Minister of Transport "intends withdrawing the toll tariff determination which was published on 13 April 2012" (Gordhan paragraph 91) and that a new notice will be published after government continues to "engage with the public and to consult on the draft regulations, the conditions of toll, and the amount of the toll that will be payable" (Gordhan paragraph 92). Apparently, this process is still not complete.

56 In order to understand why SANRAL was not ready to commence e-tolling on 30 April 2012 and is still not ready to commence e-tolling, it is necessary to have regard to the following:

56.1 Section 27(1)(b) of the SANRAL Act provides that SANRAL may levy and collect a toll for the driving or use of any vehicle on a toll road, "which will be payable at a toll plaza by the person so driving or using the vehicle, or at any other place subject to the conditions that the Agency may determine and so make known" (my emphasis).

56.2 The SANRAL Act therefore provides that toll is payable by the person “driving or using the vehicle”. It is not payable by the owner of the vehicle (unless he or she also happens to be the person driving or using the vehicle at the relevant time).

56.3 On 13 April 2012, the Director-General of Transport published Tariffs for the Different Categories of Road Users in Government Notice 310 ("the Tariffs Notice"). I attach a copy of the Tariffs Notice as "**OUTA2**".

56.4 The Tariffs Notice imposes liability to pay e-toll on a “user”. A “user” is defined in the Tariffs Notice as “a person driving or using a motor vehicle on a GFIP-toll road”. Significantly, the definition of a “user” does not refer to the registered owner of the vehicle.

56.5 The Tariffs Notice means that, when a car drives under an e-toll plaza and an e-transaction occurs, the person “driving or using” the vehicle will be liable to pay the toll. This will be the driver or the passenger, without regard to whether he or she also happens to be the registered owner of the vehicle. In other words, the owner of the car is not liable to pay the toll if he or she is not driving or using the car on that occasion.

56.6 It follows that SANRAL will have to recover the toll from the person who was “driving or using” the vehicle at the moment when the e-transaction occurred – even if he or she is not the registered owner of the vehicle. In practice, this cannot be done because SANRAL simply has no way of ascertaining the identity of the driver or user. All that SANRAL knows is

the identity of the registered owner of the vehicle (who registered for the e-tag or who can be identified by way of the vehicle licence plates).

56.7 The imposition of liability to pay tolls on the person “driving or using the vehicle” creates few difficulties where the toll is physically paid at a brick-and-mortar toll plaza. However, it creates insuperable difficulties in the case of e-tolling because an e-toll transaction is defined in the Tariffs Notice as “the single passage of a motor vehicle under an e-toll plaza and the recognition of the motor vehicle by electronic equipment” (my emphasis). It is the motor vehicle which is recognised by the system, and yet it is the person “driving or using” the motor vehicle who is liable to pay the toll.

56.8 The problem is well-illustrated by clause 2.9 of the Tariffs Notice, which provides that “an alternate user is identified by an e-tag or a VLN (ie, number plate)”. The fact of the matter is that neither an e-tag nor a VLN will be of any assistance in identifying the "user", because the user is the person "driving or using" the motor car. The same problem applies to clause 2.7, which provides that “a registered VLN user is identified at the time of the e-toll transaction by a VLN”. The VLN will tell SANRAL nothing about the person who was driving or using the motor car at the moment when the e-transaction occurred.

56.9 Section 73(1) of the National Road Traffic Act 93 of 1996 does not assist SANRAL in the present circumstances, since it provides as follows:

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

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

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

56.12 I assume that this is one of the "regulatory and administrative issues" which Mr Gordhan refers to in paragraph 81 of his founding affidavit. However, Mr Gordhan provides no indication of what process will be followed or when it will be completed. I am advised that any such process will take several months and that it is unlikely that a new tariffs notice will be ready to be issued in August 2012. To date, there has been no public participation process in relation to the new tariffs notice. The revised tariffs notice has not even been presented to the public.

57 A further difficulty which confronted the commencement of e-tolling on 30 April 2012 was this:

57.1 In the run-up to 30 April 2012, the Minister of Transport stated repeatedly that public transport operators would be exempted from the obligation to pay e-tolls. SANRAL confirmed in its answering affidavit before the High Court that "it has already been indicated by the Minister of Transport that these exemptions will include exemptions granted to qualifying public transport operators". Mr Gordhan makes the same point in his founding affidavit before this Court, when he states that "government has made specific concessions to exclude public transport users" (Gordhan paragraph 37).

57.2 The power to grant an exemption vests in SANRAL, not the Minister of Transport. It is a power sourced in section 27(1)(c) of the SANRAL Act. It must be read with section 27(2), which provides that an exemption "will become effective only 14 days after a notice to that effect by the Agency has been published in the Gazette".

57.3 Since e-tolling was due to commence on 30 April 2012, any exemption for public-transport operators had to be published in the Gazette at least fourteen days before 30 April 2012. This did not occur. To date, the exemption has still not been published in the Government Gazette.

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

Regulations is annexed marked **OUTA3**. They were made in terms of section 58(1)(1)(d) of the SANRAL Act, which provides that the Second Respondent may make regulations "prescribing a form to be used in connection with any claim for compensation or in connection with any application, authorisation, approval, permission or exemption provided for in this Act, or prescribing the information to be furnished and procedure to be followed in connection with any of those matters". Significantly, the draft Regulations did not provide an exemption for public-transport operators.

57.5 In short, there was no exemption for public-transport operators that could have been operative on 30 April 2012. At the hearing before the High Court, the OUTA Respondents applied for leave to introduce this fact this into evidence. The application was dismissed by the High Court. What is relevant for present purposes is that SANRAL filed heads of argument in which it advanced the following contention in paragraph 59:

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

57.6 This contention is entirely at odds with what Mr Gordhan says in paragraph 37 of his founding affidavit before this Court. There Mr Gordhan states that "government has made specific concessions to exclude public transport users". Remarkably, SANRAL's view is that no such concession has yet been made. In circumstances where the Transport Minister and SANRAL were apparently at loggerheads regarding whether public-transport operators would be exempted , e-tolling could not have commenced on 30 April 2012.

58 Even now, Government's position regarding e-tolling is unclear. I have already indicated that the Minister of Transport announced a postponement of e-tolling on 26 April 2012. It is not clear to me whether that postponement would have come to an end irrespective of the interdict granted by the High Court. Conspicuously, the founding affidavits before this Court do not state that SANRAL would be in a position to commence e-tolling were it not for the High Court interdict.

59 In sum, SANRAL and the Minister of Transport were not ready to commence e-tolling on 30 April 2012 and are not ready to do so now. Moreover, there is no reliable indication when they will be ready to do so. This is fatal to the applicants' averment that the interim interdict is causing harm by preventing SANRAL from collecting tolls.

<u>The harm relied upon by the applicants</u>

60 The harm relied upon by the applicants is in any event exaggerated and inaccurate for the reasons that follow.

61 Mr Chris Hart, whose confirmatory affidavit (in which his qualifications are set out) is attached as **OUTA4**, confirms the following:

61.1 State owned enterprises (SOEs) and state finances must be distinguished from one another. SOE finances are not included on the state's balance sheet. SOEs are run as separate businesses or entities.

61.2 SOEs are expected to raise their own funding and the revenue mechanisms for doing so are largely within the control of the SOE in question.

61.3 The state, as owner of the SOE, can choose to intervene in the affairs of the SOE should it run into financial difficulty.

61.4 The revenues collected by the SOE, even if collected through SARS and/or a general revenue collection mechanism (such as the fuel levy in the case of the Transnet pipeline), do not appear in the state's accounts.

61.5 Should the courts uphold the objection to the e-tolling mechanism, there are a number of alternative mechanisms that can be considered. If SANRAL faces financial difficulties it would be owing to the government's refusal to consider alternative mechanisms rather than a decision by a court to set aside the decisions impugned in this review.

61.6 It is plain that there are alternative funding mechanisms, such as the fuel levy, that can be implemented immediately. These would provide comfort to the rating agencies owing to the greater efficiency and revenue certainty that they would provide. The government can also fund SANRAL with ease by means of the budgeted contingency referred to below.

61.7 The allegations that government finances are under severe pressure are untrue. The debt of SANRAL is very small in the context of the national debt and is fully and easily provided for in the contingency reserve.

61.8 The suggestion is made by the Minister in his affidavit that “citizens who enjoy higher than standard infrastructure ought not, as a matter of policy, to be subsidised by others who do not” and that “the equitable division of nationally collected revenue between provinces, which is government by constitutional principles, would be compromised by a replacement of toll revenue with general government support” (Gordhan paragraph 29). However, there are various infrastructure projects under way presently that contradict these assertions directly. The Coega port has been built with state resources and also by raising tariffs at other ports to fund it. The IDZs (Industrial Development Zones) are also infrastructure projects that have been supported with general state revenue. Various stadiums for the World Cup were built with funds gained from general state resources. There are many instances where this has occurred in current policy.

61.9 The government does build in budget flexibility. The government has budgeted R5.81bn for contingencies for the current financial year and R11.884bn for the following financial year.

61.10 If SANRAL's annual debt servicing costs obligations were to be met by the state, there is more than adequate flexibility in the current financial year to deal with any contingency that may arise from an interdict to prevent SANRAL from e-tolling.

61.11 There is further flexibility in the State’s capital expenditure budget, where there is a problem of under spending. Again, the budget for CAPEX in the current financial year is R257bn. An underspend of R2.0bn can easily be used to absorb SANRAL's debt-servicing obligations should the government choose not to implement an alternative funding mechanism for SANRAL.

61.12 Further flexibility in government finances can be gained from its current debt position where it holds a cash balance of R114bn (local) and R50bn (foreign). The R20bn SANRAL debt cost represents 2 percent of government's net loan debt.

61.13 In 2011, the government had to find R1.2bn for higher than expected salary adjustments in National Departments and R3.2bn for Provincial Departments. This amounted to a total of R4.4bn for 2011/12. The decisions to award civil servants a bigger-than-inflation and bigger-than-budgeted salary increase in 2011 have been taken with greater ease than the apparently inflexible stance over eTolling. This is also despite

civil service salaries exceeding those in the private sector. The salary decision had a far greater impact on government finances than absorbing the GFIP costs both in the short term and long term. The relative impact of absorbing GFIP costs is very small in comparison.

61.14 SANRAL's downgrade cannot be attributed solely to Prinsloo J's order. It is also attributable to doubts about the prospects of the necessary revenues being raised by e-tolling.

61.15 while SANRAL may have faced difficulty raising loan funding as a result of the downgrades were it an ordinary private company, as an SOE it is able to fully circumvent the effect of the credit downgrade by government's explicit or implicit guarantee.

61.16 if the state explicitly guarantees SANRAL's debt, then the state's credit rating would apply and SANRAL would be able to raise finance at a rate very similar to what the state could achieve. If the debt is implicit (i.e. by its status as an SOE and not an express legal instrument by government) then SANRAL, even as a state owned entity, would pay a small (i.e. not onerous) premium in the markets. This is observed on all state owned entities such as Transnet, Eskom. If Treasury gave an explicit guarantee, it charges that entity a fee for doing so, which is why much debt is issued by state owned entities without that guarantee.

62 Dr Azar Jammine, whose confirmatory affidavit (in which his qualifications have been set out) is attached as **OUTA5**, confirms the following:

62.1 According to research which he conducted more than a year ago, the estimated revenue from the GPIF would be in the order of R300m per month, or R3.6bn per year. At that time, however, the tariffs assumed were significantly higher than those at which the scheme was set to be introduced most recently. For example, for ordinary passenger vehicles using an e-tag, the tariff was set at 49c per km. Following protests in the public domain and various other submissions, the government subsequently agreed to offer a R5.75bn contribution to the repayment of the R21bn SANRAL loan. This paved the way for tariffs to be introduced at a much lower rate. In the case of passenger vehicles the rate was 30c per km. Taxis were, furthermore, exempted completely. Accordingly, this reduces the projected revenue from e-tolls to somewhere between R2bn and R2.5bn annually, rather than the R3.6bn figure originally assumed.

62.2 Dr Jammine was therefore confused to read in the affidavit of the Minister of Finance that "additional consultation with the public has already cost SANRAL R2.7 billion, which is a sizeable 40% of its estimated 2012 toll revenue budget" (Gordhan paragraph 39). This would imply that the annual revenue budget was far higher, at around R6.75bn, than the figures of between R2bn and R2.5bn. This confusion has been exacerbated further by the fact that in his supporting affidavit to the current application, the CEO of SANRAL presents a table "NA1", which incorporates a figure for projected accumulated revenue over 24 years, of R89.72bn. Simple arithmetic shows that an annual average

revenue figure based on this is R3.73bn, i.e. far lower than the R6.75bn number mentioned in the founding affidavit.

62.3 Furthermore, if one were to discount the average annual revenue adjusted for inflation to today's prices, one would probably arrive at a current revenue estimate of less than R2bn, again far lower than the R6.75bn set out in the founding affidavit.

62.4 The alleged estimated annual debt servicing requirement of R270m X 12, equal to about R3.3bn, is easily subsumed into the magnitude of the contingency reserves detailed in the 2012 Budget Review, namely R5.81bn for the current 2012/13 fiscal year, R11.88bn for the 2013/14 fiscal year and R24.0bn for the 2014/15 year. (I attach the relevant page 43 of the 2012 Budget Review hereto as **OUTA5.1**).

62.5 It is exaggerated to say that that further non-implementation of the tolling system would in due course jeopardise the rating on South African government bonds more generally. Firstly, the total amount of debt outstanding in respect of SANRAL, at R21bn, is equivalent to no more than 2% of South Africa's total domestic debt of more than R1 trillion. It also amounts to no more than 0.7% of annual GDP and about 2% of annual government expenditure, budgeted to be R1.058 trillion in 2012/13. In other words, in the broader scheme of things, it is insignificant.

62.6 International bondholders have a high regard for the integrity and capability of the National Treasury which has established a fine

> reputation over many years of solid fiscal discipline. Indeed, the very fact that the credit rating on South African government bonds is currently on the relatively high side in relation to other countries, represents an endorsement of confidence in the country's fiscal management.

63 SANRAL, as confirmed by Gordhan, is obliged by law to keep non-toll revenue accounts and toll revenue accounts separate.

64 But SANRAL is also obliged by law to ring-fence toll revenue schemes because cross-subsidisation from one toll scheme to another scheme or non-toll road scheme is impermissible.

65 The consequence of the above is that SANRAL's other road projects, whether tolled or non-tolled, are ring-fenced from the GFIP and are unaffected by events relevant to the GFIP.

66 The only harm that arises to SANRAL financially while it is not receiving toll revenue is the risk that, in respect of the GFIP project, it is unable to meet its financial commitments. However, government has repeatedly stated since the announcement on 17 May 2012 that it intended to appeal against the interim order, that government will fund SANRAL in the interim and that SANRAL’s defaulting on its loan obligations is “*not an option*”.

67 The consequence of the above is that not only is SANRAL not at risk of defaulting on its loan obligations, but it is able to continue work on all other projects, which will be unaffected.

68 The South African Government is, as is apparent from the above, not at any risk of a credit rating downgrade. It is easily able to fund SANRAL in the interim without any compromise to other budget commitments.

69 It can also avoid utilising funds from the fiscus altogether, whether temporarily or permanently, by putting in place alternative revenue raising mechanisms such as an increase on the fuel levy.

Summation

70 I accordingly submit that there is no proper basis for the applicants' contention that the interim interdict is causing irreparable financial harm.

Prospects of Success

71 For the reasons that follow, I respectfully submit that the applicants have failed to establish that they have reasonable prospects of success on appeal.

Prima facie right

72 The applicants criticise the finding of Prinsloo J that the OUTA Respondents had established a *prima facie* right to the relief sought in the review. I am advised and I respectfully submit the criticisms are without merit. Each is dealt with in turn below.

73 The grounds of review advanced by the OUTA Respondents in the High Court were in summary as follows:

73.1 The decisions sought to be reviewed and set aside are:

73.1.1 the declarations by SANRAL in terms of section 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("the SANRAL Act") to declare seven sections of national road a toll road;

73.1.2 the decision by the Minister of Transport in terms of section 27(1)(a) read with 27(4) of the SANRAL Act to grant approval to SANRAL to declare the aforementioned sections of national road to be toll roads; and

73.1.3 the decisions of the Minister of Environmental Affairs and/or the Director-General to grant seven environmental authorisations in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA").

73.2 The grounds upon which the OUTA Respondents approached the High Court for relief were set out in the founding affidavit as follows:

73.2.1 SANRAL failed to give proper notice under section 27(4)(a) of the SANRAL Act of the intent to toll the proposed toll network in that the content of the notice given was defective and/or insufficient;

73.2.2 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. These entities were either known to or reasonably identifiable by SANRAL and/or the Minister of Transport;

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

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

73.2.4.1 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;

73.2.4.2 the proper enforcement of the open road tolling scheme on the proposed toll network is practically impossible;

73.2.4.3 there was a manifest failure on the part of SANRAL to meet the mandatory conditions set out in section 27 of the SANRAL Act;

73.2.4.4 SANRAL and/or the Minister of Transport were not open to and did not properly consider alternative methods of funding;

73.2.5 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;

73.2.6 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]*";

73.2.7 SANRAL's application to the Minister of Transport for approval omitted material information on the extent of the inadequacy of public transport and/or viable alternative routes;

73.2.8 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;

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

73.2.10 the basis upon which SANRAL obtained environmental authorisation was materially defective and/or misleading in substance in that it was not brought to the attention of the Minister and Director-General of Water and Environmental Affairs the road works to be conducted were for the purposes of the establishment of a toll road network.

74 It is to be noted that the review was brought in terms of various provisions of PAJA, including:

74.1 6(2)(f)(ii);

74.2 6(2)(vi); and

74.3 Section 6(2)(h).

75 It was also based on non-compliance with the relevant legislative provisions discussed above.

76 It is noteworthy that none of the impugned decisions are decisions by Cabinet or by Treasury. The OUTA Respondents do not seek in the review application to change the government policy on transport set out in the White Paper on National Transport Policy of 1996. The OUTA Respondents also do not seek to strike down the SANRAL Act because it makes provision for the levying and collection of toll as one of the funding mechanisms available to SANRAL for its road projects.

77 It was expressly stated on behalf of the Respondents in the founding affidavit that such application was limited to a review of whether "*open road tolling was a viable option for consideration by SANRAL and the Minister of Transport in the case of the proposed toll road network. The application does not address the broader question whether open road tolling may reasonably and usefully be implemented in other cases on other road networks in South Africa*" (emphasis as in founding affidavit).

78 What is sought to be set aside are the declarations of the various sections of the proposed toll road network as toll roads.

79 The applicants take issue with the alleged failure of Prinsloo J to deal at all with their contention that there had been an unreasonable delay on the part of the

OUTA Respondents in bringing their review. They base their complaint primarily on two preliminary reasons:

79.1 There can be no *prima facie* right to succeed in the review where, as a necessary precondition to upholding the review, the reviewing court will need to exercise a discretion whether or not to grant condonation (Gordhan paragraph 108).

79.2 Because Prinsloo J failed to appreciate that the unreasonable delay was fatal to the review application, the appeal should succeed (Gordhan paragraph 110).

80 However, neither of these propositions is sustainable:

80.1 The first proposition is self-evidently wrong. A court considering whether to grant an interim interdict pending a review is able to assess whether there is a *prima facie* prospect of condonation being granted (as readily as it can assess whether there is a *prima facie* prospect of the review being upheld). If the applicants' position were to be adopted, no applicant who was out of time in launching review proceedings would ever be entitled to interim relief.

80.2 The second proposition conflates appeals and reviews. Even if Prinsloo J failed to appreciate that the unreasonable delay was fatal to the review application, this would not of itself invalidate his decision. In an appeal, the question is whether the order is correct in the light of the record. In any event, it was submitted to Prinsloo J that the same

factors which made the application urgent despite the delay since the decision to declare the toll roads as such were gazetted, would be likely to persuade the review court to grant condonation for the delay in launching the review. Prinsloo J prepared his judgment under conditions of extreme urgency. The fact that he did not expressly address delay, does not mean he did not consider it. The question, at the end of the day, is whether the evidence on record shows that delay was fatal to the prospects of the review.

80.3 On that score, the applicants give three reasons why, had Prinsloo J considered the question of delay expressly, he would have found that there was no prospect of the reviewing court condoning the OUTA Respondents' delay:

80.3.1 The OUTA Respondents' suggestion that they could only launch the review when they found out about the high level of tolls (in April 2012), disregards the fact that the decision to declare the roads to be toll roads – the decision under review – is distinct from the decision to adopt particular tariffs (the decision made in April 2012) (Gordhan paragraphs 111.1 to 111.3 of the founding affidavit).

80.3.2 The OUTA Respondents' version is in any event self-destructive, because they launched the review before the tariffs were announced (Gordhan paragraphs 111.4 to 111.5).

80.3.3 The OUTA Respondents failed to address the fact that SANRAL placed considerable reliance on the validity of the decisions under attack, given the failure of anyone to challenge them. It was reasonable of SANRAL to rely on the validity of the decision (Gordhan paragraphs 111.6 to 111.7).

80.4 The OUTA Respondents make the following submissions regarding the question of delay:

80.4.1 The delay in applying for review was fully explained in the founding affidavit. While SAVRALA (unlike the balance of the OUTA Respondents) knew of the plans of SANRAL to toll the freeway network as early as mid-2008, it had no reason at that stage to believe that its members should do anything other than seek to co-operate with SANRAL in preparing for the commencement of tolling. This SAVRALA and its members did by meeting with key account holders at the end of 2010. It continued to do so into 2011. SAVRALA's position changed when the constructive engagement between SAVRALA and its members and SANRAL deteriorated to the point that no real progress could be made. This was on account of the fact that SANRAL was not able to address operational obstacles that SAVRALA's members would encounter. It also changed when SAVRALA's members learned during the consultations held during 2011 of material facts such as the disproportionate

cost of tolling and the impossibility of reasonably implementing the scheme.

80.4.2 SAVRALA sought, like many other stakeholders, to engage with SANRAL and the Department of Transport and voice their opposition alongside the many other private stakeholders believing that the system would not be implemented. SAVRALA continued to make representations all the way through into February 2012 to both the SANRAL board and to Treasury at a stage when tolling had again been postponed.

80.4.3 It was when the Minister of Finance gave the final word on 22 February 2012 that that e-tolling would be introduced that SAVRALA sought legal advice and urgently prepared and launched pleadings in the High Court;

80.4.4 The other persons before the Honourable Court, QASA and its members, individual deponents Maphoroma, Tabakin, Leatswe, Osrin and many hundreds of thousands of Gauteng road users, only became aware of the fact that the Gauteng freeways would be tolled after the publication of tariffs in or about February 2011. Many of these individuals had no ability to bring proceedings at any earlier stage and would not have done so unless the First Respondent, OUTA, had been formed to represent their cause;

80.4.5 The public interest and the interests of justice considerations are overwhelmingly in favour of the upholding of the rule of law and of the constitutional rights of many hundreds of thousands of South Africans, especially in this instance. Road users would be at risk of being forced to pay toll indefinitely in terms of an unlawful and unconstitutional tolling scheme.

80.4.6 The Gauteng freeway network would have been upgraded and expanded in any event (with or without tolling). The upgrade and expansion of the network was overdue.

80.4.7 The applicants mischaracterise the argument of the OUTA Respondents on the relevance of the tariffs. It is true that, on the version of the OUTA Respondents in the High Court, the review could not be launched until the tariffs were published. Crucially, though, it must be recalled that the publication of the tariffs did not happen for the first time on 13 April 2012. In fact, tariffs were published in February 2011. Equally importantly, it must be recalled that the implementation of e-tolling was then postponed. So, while a review was potentially possible from February 2011 onwards, the fact that e-tolling was suspended exposed the OUTA Respondents to the risk that any review brought by them would be dismissed as academic. Only after the announcement in February 2012 that e-tolling was to proceed, was it appropriate for the review to be launched.

80.5 On the basis of the aforegoing, I am advised and I respectfully submit that the OUTA Respondents indeed showed that there were *prima facie* prospects of obtaining condonation in the subsequent review and that interim relief was properly granted.

81 On the merits, too, the OUTA Respondents had made out a prima facie entitlement to relief. I shall deal in turn with each of the review grounds relied upon in argument.

82 The first ground of review relied upon by the OUTA Respondents in the High Court was that SANRAL failed to give proper notice:

82.1 In particular, the allegation was that SANRAL had failed to give proper notice of the intent to toll the Gauteng freeways to those whose rights would be materially affected.

82.2 In this regard, it was common cause that the full extent of SANRAL's efforts to publish notice of its intent to toll was to:

82.2.1 publish a notice in the Government Gazette;

82.2.2 publish the same notice in a single edition of the Sowetan, Beeld, Mail and Guardian, Star and Sunday Times newspapers in October 2007 in the case of the N1, N2, N4 and N12; and

82.2.3 publish the same notice in the Pretoria News, Beeld and Star newspapers in April 2008 in the case of the R21. (SANRAL alleged in the High Court that the notice was also published in the Sunday Times of 20 April 2008 but the legal representatives of the OUTA Respondents searched this edition without finding it).

82.3 It was also common cause that the notices gave no indication whatsoever of the likely amounts of the tolls.

82.4 Finally, it was common cause that the public were only given 30 days in which to respond, the minimum allowed by section 27 of the SANRAL Act.

82.5 The notice of intent to toll was so inadequate that despite the sheer magnitude of the scheme and the direct and personally-felt impact it would have on hundreds of thousands of commuters and other road users (on SANRAL's version up to 1 million road users per day)

82.5.1 there were only 30 written representations received in response to the notice of intent to toll in respect of the N1, N2, N4 and N12; and

82.5.2 there were only 2 responses to the notice of intent to toll the R21.

82.6 The inadequacy of the notice was further underscored by the contrast in the manner in which the widely publicised tariffs notice published on

4 February 2011 informing the public of the tolling together with the material impact tolling would have on them elicited massive public outcry. It is also underscored by the high number and broad spectrum of stakeholders that voiced opposition to tolling at the GFIP Steering Committee hearings.

82.7 The omission of information from the notice of intent to toll of the indicative cost of tolling of 50 cents per kilometre, an amount known to SANRAL at the time, clearly rendered the notice fatally defective.

82.8 In order to give effect to section 4 of PAJA, the notice of intention to declare the tolls roads had to afford the public at least some indication of the likely amount of the tolls. Its failure to do so amounted to a failure to comply with section 27(4)(a) of the SANRAL Act read with section 4 of PAJA.

82.9 On SANRAL's approach, the public would only become informed of the extent that tolling of the road would impact them after the roads were built and on the brink of the commencement of tolling at the time that the tariff notices were published. This would be too late since SANRAL and the Minister of Transport would, at that stage, not be open to winding the clock back, even if they wanted to. This is precisely what happened.

83 The second ground of review relied upon by the OUTA Respondents in the High Court involved the disproportionate costs of tolling:

83.1 It was alleged that the expense of collecting e-toll was so unreasonable that no reasonable administrator would have chosen it. It was submitted that paying more for the collection of toll than for the road upgrades themselves, was irrational.

83.2 The OUTA Respondents relied on the tender figures in the GFIP Steering Committee Report to show that it would cost R21,568 billion for the collection of the capital debt of R 20,562 billion. On these figures the costs of toll collections would exceed the costs of the road upgrades themselves.

83.3 The OUTA Respondents went on to:

83.3.1 allege that the costs were in fact much higher, and recounted two specific occasions of deliberate avoidance of the disclosure of the true cost by SANRAL's CEO, Nazir Alli, and the Director General for Transport, George Mahalela;

83.3.2 expressly invite SANRAL to produce the toll operation contract between SANRAL and the toll operator, ETC JV, disclosing the true costs.

83.4 The Minister of Transport did not deal with the OUTA Respondents' case in this regard at all, whereas SANRAL:

83.4.1 did not produce the contract between SANRAL and ETC JV;

83.4.2 did not take the Court into its confidence by disclosing the true cost;

83.4.3 did not deal at all with the allegations concerning Alli's avoidance of direct questions to him on the true cost of tolling;

83.4.4 baldly alleged that the Minister of Transport was at all times fully aware of the correct costs (notwithstanding the admission by SANRAL that the true costs were not known initially when the decision was made to adopt e-tolling);

83.4.5 said cryptically that "*the [OUTA] figures…are correct but the assumptions are flawed insofar as the figures cited are those that are estimated based on a public non-compliance in excess of 60%*".

83.5 In regard to the last point, it was accepted by Prinsloo J that there was no likelihood that the Steering Committee Report figures were based on 60% non-compliance. No such qualification had been made in the Report.

83.6 The only other allegation concerning costs made by SANRAL was that the costs of a "*compliant toll transaction"* was "*in the order of 15 cents in the rand*".

83.7 This isolated piece of information was, in view of SANRAL's complete avoidance of disclosure of the true costs as well as its palpably false

"*non-compliance rate of 60%*" explanation, of no real assistance to the High Court.

83.8 The High Court was therefore faced with an uncontroverted allegation that the public would be paying more for the collection of toll than for the upgrade of the roads themselves.

83.9 I am advised and I respectfully submit that the Court was therefore warranted in its conclusion that the proposed e-tolling of the toll road network was *prima facie* unreasonable. For the applicants to suggest that the reasonableness of this decision is immune from scrutiny in terms of section 6(2)(h) of PAJA is remarkable.

83.10 I should point out that, in the process of preparing this affidavit, the OUTA Respondents have obtained a copy of the contract referred to in paragraph 83.3.2 above. It was annexed to an affidavit filed by Kapsch Trafficcom SA (Pty) Ltd in unrelated proceedings under case no. 03384/2012 in the South Gauteng High Court. To date, it has not been revealed to the OUTA Respondents or to the court by the applicants, including as part of the rule 53 filed by them. I annex, as "**OUTA6**", a copy of the contract. It may be seen from page 1 of the contract that the total cost of operating toll collection over the duration of the five year contract is R8,3507 billion, or R 1.67 billion per year. Taken over 20 years, this means that the cost of collection is, in fact, R 33.4 billion, R 13.4 billion more than what was assumed in the founding affidavit. Road users will annually be paying more (much more) for toll collection than the net revenue collected.

83.11 At the hearing of the application, SANRAL and the Minister of Transport shifted the focus of the enquiry from the actual cost of toll collection (dealt with in the papers) to the estimated costs at the time the decision was taken to declare the road network as toll roads in 2008.

83.12 They pointed to two documents in the papers filed of record:

83.12.1 The first was the proposal of September 2006 annexed as "FA6" to the founding affidavit in the present application (“the September 2006 proposal”).

83.12.2 The second was the actual application in terms of section 27 of the Act by SANRAL to the Minister of Transport on 10 January 2008 (“the 2008 application”) in which SANRAL formally requested approval to declare various sections of Gauteng freeways a toll road.

83.13 The argument ran that the Minister of Transport was duly informed of the estimated costs of toll collection at the time he gave his approval and therefore made a fully informed decision. It was thus not open to the OUTA Respondents to attack the decision on the basis of the 2011 tender figures, no matter how exorbitant they were. This is the point made by the Minister of Finance in these proceedings.

83.14 The argument was (and is) fatally undermined by the very documents relied upon by SANRAL.

83.14.1 I attach a copy of excerpts of the 2008 application to the Minister of Transport (the whole document is annexed to the answering affidavit of SANRAL) as "**OUTA7**".There is no information about the costs of toll collection in the 2008 application at all. The only information related to the cost of tolling contained in the 2008 application was the capital infrastructural cost of the toll gantries.

83.14.2 The 2008 application was therefore of no assistance to SANRAL. It in fact destroyed the very argument that SANRAL was trying to make as it showed that the collection costs were not before the Minister of Transport at all at the time the decision was made.

83.14.3 The OUTA Respondents alleged that the failure of the 2008 application to inform and take into account the toll collection costs was "*a startling omission*". SANRAL admitted the omission but alleged that "*this is not a startling omission*" as the costs of collection and enforcement of e-tolling were matters "*ancillary to the statutory matters and issues with which section 27 is concerned*".

83.15 The September 2006 proposal (being the second document relied upon by SANRAL and the Minister) was not before the Minister of Transport at the time that he decided to approve the declarations of the sections of the Gauteng freeway as toll roads.

83.16 In any event, the only information in the entire proposal on the costs of tolling was a single sentence, namely, "*the yearly estimated operations and maintenance costs amounts to R200 million (excl VAT, 2006 rand)*".

83.17 The R200 million figure (in which the cost of toll collection had been bundled together with maintenance costs), was manifestly an unsubstantiated guess which had not been properly researched. Indeed, the very same page referred to the need for "*specialist studies*" to be carried out in order to determine toll feasibility.

83.18 It was accordingly submitted to the High Court that, even if the Minister of Transport had had the September 2006 proposal before him at the time he made his decision, his dependence on such a manifestly unreliable figure would render his approval irrational and unreasonable.

83.19 It is for this reason that SANRAL has sought to introduce fresh evidence in this application in the form of the schedule attached as "NA1" to the affidavit of Nazir Alli. Annexure “NA1” did not form part of the papers before the High Court.

83.20 The OUTA Respondents’ response to this new evidence is that it should be rejected for the following reasons:

83.20.1 the true cost of tolling is contained in, and can now be calculated from, the contract between SANRAL and the tolling company Electronic Toll Collection (Pty) Ltd referred to in paragraph 83.3.2 above, which SANRAL has withheld;

83.20.2 The contract reveals that the facts put up in “NA1” are wrong;

83.20.3 Furthermore, the schedule and Nazir Alli’s accompanying allegations that the costs of tolling will decrease is contradicted by the information placed before the National Council of Provinces by the Minister of Transport on 23 April 2012 in the Written Reply attached as “**OUTA8**“. The Written Reply makes clear that:

83.20.3.1 the toll costs for 2013 are R 1.1221 billion while the projected revenue to be collected in the same period will only be R 1.084 billion;

83.20.3.2 The projected toll costs for 2014 are R 1.421 billion while the projected toll revenue to be collected will be R 2.4945 billion;

83.20.3.3 The toll costs will increase and not decrease over time;

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

83.20.4 SANRAL can also not claim to have control or be able to predict the costs of toll collection beyond five years as this is subject to tender.

84 The third ground of review which was relied upon by the OUTA Respondents in the High Court was that the Minister of Transport was misled concerning the costs of toll collection:

84.1 This was added as an additional review ground after the OUTA Respondents received the record filed by SANRAL in the so-called *HMKL* proceedings.

84.2 It was apparent from this record that the Minister of Transport

84.2.1 had approved the declaration of the Gauteng freeways as toll roads in ignorance of the exorbitant costs of toll collection that would have to be paid by the public; and indeed

84.2.2 was misled by virtue of the content of the economic impact report annexed to the 2008 application in which the “Toll Collection Costs” misleadingly referred to the infrastructure costs only.

84.3 As shown above, these facts were not controverted in the High Court. They form a compelling basis for a review and setting aside of the approvals and the toll declarations consequent upon such approvals, on the basis that the Minister of Transport had made the decision to approve the toll declarations in ignorance of material facts.

85 The fourth ground of review relied upon by the OUTA Respondents in the High Court was that the practical impossibility of enforcing the system properly rendered the decision to toll unreasonable:

85.1 The facts before Prinsloo J were as follows:

85.1.1 there would be approximately one million road users using the proposed toll road network each day;

85.1.2 there would be at least a non-compliance percentage of 7% according to Nazir Ali who quoted the international benchmark in respect of toll non-compliance;

85.1.3 the GFIP Steering Committee had predicted and warned against high levels of non-compliance in the context of the high levels of public controversy concerning the scheme.

85.2 The OUTA Respondents submitted that there would be at least 70 000 users per day (and 2.1 million users per month) who would not pay toll and from whom toll collection would have to be enforced.

85.3 The proper collection and enforcement would entail the issuing of summonses and legal notices and institution of court proceedings which would render enforcement proceedings practically impossible.

85.4 It was alleged on behalf of the OUTA Respondents that it was clear that SANRAL had simply failed to apply its mind to how the magnitude of the scheme made the tolling mechanism to be used practically unworkable.

85.5 SANRAL, in its answering affidavit, essentially confirmed this by baldly responding that:

> *"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."*

85.6 The argument presented on behalf of SANRAL at the hearing and repeated by Mr Alli in his new affidavit, with reference to the analogy of service providers such as Eskom, is without merit.

85.7 The reason for this is that, as was accepted by the High Court, the choice of upgrading the roads was never dependent upon the existence of a single funding mechanism. As was clear from the papers before the High Court, the roads would always have been upgraded. The "*do nothing*" option was not an option, as is also evident from the 2006 proposal attached to the founding affidavit in the present application.

85.8 In the analogy used by Mr Alli, Eskom's choice was not whether to provide electricity, but which reasonable methods to adopt to collect for the service provided.

85.9 SANRAL chose a collection mechanism that was flawed at the level of practicality. It was therefore not reasonably open to SANRAL to choose that method above other workable methods of funding.

85.10 The new “collection every three years” approach suggested in the founding affidavit in the present application is, it is submitted, also of no assistance to the applicants.

85.11 Delaying collection for three years is irrational since it erodes the very viability of the funding mechanism.

85.12 What is more, even if SANRAL left the non-compliant users for a period of up to three years, there would be a tipping point on a date in the future after which the enforcement of 70 000 claims per day or 2.1 million claims per month could no longer be avoided.

86 The fifth ground of review relied upon by the OUTA Respondents in the High Court was that the Minister was misled regarding the existence of adequate public transport alternatives:

86.1 In relation to this ground, too, the founding affidavit filed by SANRAL in support of the present application for leave to appeal presents a whole new picture to what was before Prinsloo J.

86.2 In the founding affidavit before the High Court

86.2.1 it was alleged that the 2008 application had created the impression with the Minister of Transport that the absence of

adequate public transport alternatives would be properly addressed;

86.2.2 it was specifically alleged that "The Minister's approval was granted on the basis that adequate public transportation alternatives were or would be put in place when, in fact, this was and would not be the case";

86.2.3 it was specifically alleged further that the 2008 application "was misleading in that it created the impression that adequate public transport alternatives would be provided by SANRAL simultaneously with the upgrading and tolling of the proposed toll road network [whereas] the measures referred to would not even scratch the surface of the problem of the lack of viable public transport alternatives in the context of Pretoria and Johannesburg's urban sprawl".

86.3 These averments made by the OUTA Respondents were not dealt with by either SANRAL or the Minister of Transport in that:

86.3.1 SANRAL referred to the affidavit of the Minister of Transport; and

86.3.2 the Minister of Transport refrained from dealing with the allegations and referred to the affidavit of SANRAL.

86.4 On the facts before the High Court, therefore, the case for the OUTA Respondents on this ground of review was undisputed.

86.5 Prinsloo J's conclusion that the OUTA Respondents had established reasonable prospects of success in the review on this ground was therefore the only conclusion he could draw.

86.6 In answer to the applicants' newly made suggestions in the present application that the Respondents' case in this regard is scandalous or without merit, I point out that the Deputy Minister of Transport Jeremy Cronin acknowledged precisely such conduct in a speech to the SACP on 1 May 2012. I attach the news report published in the Beeld on 1 May 2012 as "**OUTA9"**.

87 The sixth ground of review relied upon by the OUTA Respondents in the High Court was that the environmental authorisations were irregular:

87.1 The undisputed facts underlying this ground of review were that:

87.1.1 SANRAL had, in the notices published in terms of Regulation 16(a) of the Environmental Impact Assessment Regulations issued in terms of section 24(5) of the National Environmental Management Act in Government Notice R385 of 2006 ("the EIA Regulations"), not given any notice that the roads it intended upgrading would be tolled;

87.1.2 SANRAL, in the Basic Assessment Reports ("the BARs") forming part of its application to the Minister of Environmental Affairs for environmental authorisation, had made no reference whatsoever to the fact that such roads were being

upgraded for the purpose and as part of an urban toll road network.

87.1.3 The result was that no socio-economic study was conducted by the Director-General prior to the granting of the six environmental authorisations sought and obtained by SANRAL.

87.2 SANRAL admitted all of the above facts. SANRAL's sole defence on the merits was that it was not necessary that the environmental authorities be informed that the roads would be tolled and not necessary that the socio-economic impact of tolling be considered.

87.3 The approach of SANRAL was, I am advised and submit, plainly wrong in view of the provisions of NEMA and the jurisprudence of this Court. Unsurprisingly, SANRAL's opposition on this basis was not pursued in argument before the High Court.

87.4 SANRAL then opposed the review on the basis that the Respondents had failed to exhaust internal remedies in terms of section 43 of NEMA and therefore was barred from proceeding by section 7(2) of PAJA. This point is pressed in the application for leave to appeal before this Court.

87.5 This opposition was also without merit.

87.6 The applicants refer to their contention before Prinsloo J that the OUTA Respondents failed to exhaust internal remedies in respect of the NEMA cause of action. They reject as plainly wrong Prinsloo J’s

description of the applicants' stance as a "technical argument" (Gordhan paragraphs 102 to 104).

87.7 The OUTA Respondents contend that the correct position is as follows:

87.7.1 Before the High Court, they advanced detailed arguments to the effect that the internal remedies provided in NEMA are not available at all to persons not defined as "affected persons" in terms of section 43(1) the Act.

87.7.2 The arguments advanced by the OUTA Respondents in the High Court are not addressed at all in the Minister's founding affidavit in this Court. Yet, the statement is confidently made that the OUTA Respondents have no prospects of success in the review since they failed to exhaust internal remedies.

87.7.3 It is submitted that, on a proper interpretation of section 43(1) of the NEMA Act, the internal remedy provided there would be unavailable to any of the OUTA Respondents. The stance adopted by the applicants falls to be rejected. It should be pointed out that this argument is only applicable to the ground of review based on NEMA in any event.

88 It is submitted, therefore, that the papers in the review reveal that the OUTA Respondents have a *prima facie* right to the relief sought in the review. The applicants do not, therefore, have a reasonable prospect of convincing this Court otherwise. The finding of Prinsloo J to this effect is unassailable.

Balance of convenience

89 In so far as the balance of convenience is concerned, there is a marked difference between the case put up by the applicants in this Court and the case advanced in the High Court:

89.1 In the High Court, SANRAL alleged in relation to the balance of convenience that "for every month for which tolling is delayed, beyond 30 April 2012, [SANRAL] will forego approximately R225 million of revenue" and would have to find this elsewhere.

89.2 Before the High Court, Treasury alleged that:

89.2.1 "should SANRAL fail to implement GFIP, that is, should it fail to collect tolls from 30 April 2012, that will be an event of default triggering the immediate repayment of the entire loan" (my emphasis);

89.2.2 the credit rating of SANRAL in the money markets will be severely affected;

89.2.3 the credit rating of South Africa, "and therefore the government's ability to raise sovereign debt, will be in jeopardy";

89.2.4 poverty alleviation programmes and infrastructure maintenance would be affected.

90 The above evidence was contradicted by the fact that tolling had already been postponed already on four occasions at the will of SANRAL and/or the Minister of Transport by the time the application was heard. Moreover, SANRAL had on two previous occasions stated on oath that e-tolling could not commence on a later date without SANRAL suffering irreparable financial prejudice only to follow this by itself voluntarily postponing the commencement of tolling.

91 The OUTA Respondents demonstrated that SANRAL had not placed any evidence before the court that would distinguish this occasion from any of the previous occasions of postponement.

92 In answer to Treasury, the OUTA Respondents;

92.1 argued that an adverse inference should be drawn from Treasury's failure to produce the "*domestic medium term note*" relied upon by Treasury and therefore that the court should not accept that the full amount of the government's guarantee would become immediately payable;

92.2 that it was self-evident that the South African government's credit rating would not be negatively affected by the fulfilment of its contractual obligation to guarantee SANRAL's debt;

92.3 that the servicing obligation of a debt of R19 billion was "*less than 0.2% of government's annual expenditures*" which, according to the economist Christopher Hart, from whom such information was obtained

(and whose confirmatory affidavit is attached to this affidavit), was well within the capacity of National Treasury should it assume such debt;

92.4 that the very Moody Rating Action report attached to Treasury's affidavit had given as the reason for the negative rating the reduction of toll fees and the "*higher operational risks of e-toll revenue collection and the uncertainties on SANRAL's future business model*".

93 SANRAL had not placed any evidence before the High Court concerning its financial position and why it could not either carry the financial obligations upon it in the meantime or receive bridging finance from the government in the interim.

94 I am advised and I respectfully submit that Prinsloo J was justified in reaching the conclusion that he did on the balance of convenience:

94.1 in the light of the history of postponements by SANRAL and/or the Minister of Transport at will; and

94.2 the failure to distinguish such previous occasions from the occasion before the Honourable Court seen in light of the strong case of the OUTA Respondents on the merits.

95 I pause to state that the further postponement by the Minister of Transport on 26 April 2012 vindicated the OUTA Respondents' contentions regarding the balance of convenience.

Irreparable harm

96 The applicants contend that the OUTA Respondents failed to show irreparable harm before Prinsloo J:

96.1 They say that, at best, the OUTA Respondents showed that harm might arise from members of the public having to pay tolls (Gordhan paragraph 34).

96.2 They contend, further, that the idea that members of the public will have to pay tolls must be understood in the context of the fact that the cost of the GFIP must be paid for by the public – the only question is whether this should be done directly by the user pay principle or indirectly through taxes, fuel levy and the like (Gordhan paragraph 35; See also Gordhan paragraph 37).

96.3 They contend "there can be no question of irreparable harm arising if government chooses to make motorists pay in one manner as opposed to another." (Gordhan paragraph 114.4)

97 This reasoning is, however, without merit:

97.1 The focus in the applicants' argument is on the question whether the "user-pay principle" is appropriate. The premise of the argument is that there is no self-evident harm, because members of the public will have to pay for the roads one way or the other.

97.2 This inquiry misses the point. If the OUTA Respondents succeed in the main application (ie, the review), then the decision to declare the relevant roads to be toll roads will be set aside. The e-tolling system, in its present form, will not be implementable. Members of the public who otherwise would have had to begin paying tolls on the relevant roads, will not be obliged to do so.

97.3 The premise of an interim interdict is that a party who has a *prima facie* prospect of obtaining certain relief in due course, should not be required to suffer the harm which that relief is designed to cure, while awaiting his or her day in court. There can be little argument that, as a matter of fact, the requirement to pay tolls is prejudicial to those who must pay. As explained in more detail below, the introduction of tolling will be highly prejudicial for many users of the relevant roads who have no choice but to use them. Whether that prejudice is something which they legally have to bear, is a matter which will be determined in the main application. That engages whether the OUTA Respondents demonstrated a *prima facie* entitlement to the relief sought in the review. But as far as irreparable harm is concerned, the enquiry must focus on the factual position. The factual position reveals that persons on the margin of poverty will be forced to pay significant amounts of money in order to use roads upon which they rely for their survival. The fact that the users of the road will have a potential enrichment claim is cold comfort for them while having to pay the tolls in their impoverished position. Even if the money will ultimately be repaid, the harm to the persons discussed below will be real and immediate. They will have to

find a way to survive now, regardless of whether they will be repaid in due course.

97.4 Mr Gordhan's allegation in paragraph 119 of his founding affidavit that motorists would have an enrichment claim against SANRAL, is undermined by the fact that SANRAL has conspicuously failed to give an undertaking to repay such monies. In other words, SANRAL has steadfastly declined to give an undertaking that it will repay all tolls paid by motorists if the review were to succeed in due course.

97.5 Furthermore, the suggestion that there can be no irreparable harm once one accepts that motorists will pay one way or the other, is simply untenable. The system of e-tolling has significant similarities to a poll tax – broadly speaking, everyone is charged at the same rate. Therefore, even if the most affluent in society will end up paying the vast majority of the tolls (a point made in the founding affidavit), the impact of tolls will be felt the most by the poorest motorists. This is because the amount which they will be forced to pay each month will be a significant percentage of their nett income. Conversely, there are a range of revenue-generating methods, such as increasing income tax, which have minimal implications for those in the lowest tax bracket.

98 The papers in the High Court demonstrated the following:

98.1 The members of QASA, quadriplegics and paraplegics, receive a disability grant of R1 200 per month;

98.2 99% are unemployed and the vast majority are previously disadvantaged;

98.3 They are reliant on being transported by private car on account of the inaccessibility of public transport;

98.4 They cannot be exempted from paying tolls given that the vast majority are transported by friends, family members and other third persons who they reimburse for travel expenses out of the disability grant on which they live;

98.5 Should tolling commence, they will be forced to pay unlawful toll fees which, given the amount that they have to live on, will cause them to suffer privation in a form that cannot be subsequently addressed;

98.6 There is also no reasonable possibility of any such individuals recovering the amounts paid by them for toll fees given that:

98.6.1 First, they would never be in a position to launch or sustain legal proceedings against SANRAL;

98.6.2 Secondly, toll fees would in almost all cases be paid by them not to SANRAL but to the third party who transports them;

98.7 Before the High Court were the affidavits of individuals (in the same position as many ordinary citizens) by the name of Hilda Maphoroma, Denis Tabakin, Tshidi Leatswe and Wayne Osrin who similarly had no option but to make use of the Gauteng freeway network and who would

either suffer serious financial constraint by having to pay tolls or could not afford to do so;

98.8 Such individuals (whose position and story could be multiplied tens or even hundreds of thousands of times over) may also consequently suffer privation together with their families;

98.9 They could likewise not be reasonably expected to launch and sustain a legal claim against SANRAL for toll fees;

98.10 The members of SAVRALA placed evidence before the court of the massive logistical and administrative prejudice they would suffer in attempting to administrate the collection of toll fees from their clients (particularly in a situation where SANRAL had not been able to give them real-time interface with SANRAL's systems);

98.11 The loss of time and resources, in addition to the cost of setting in place such administrative systems and employing personnel to run them, would be very difficult to quantify;

98.12 it is not clear that legally they would have the ability to reclaim the losses suffered even if they were factually able to launch and fund a claim against SANRAL.

98.13 Quite apart from the above is the fact that, should tolling commence, the OUTA Respondents, the persons whom they represent and all users of the Gauteng freeways would be required to pay toll in terms of an unlawful and an unconstitutional tolling scheme not only pending the

final review but thereafter, and additionally, because should e-tolling commence there is no reasonable likelihood that any court on review would set the toll scheme aside.

98.14 The effect of tolling commencing in the interim will not only extend to the prejudice to be suffered on a temporary basis, but will be ongoing and indefinite. In short, the public will be trapped into paying for an unlawful tolling scheme permanently.

99 I accordingly submit that there is no reasonable prospect that another court would differ from the finding of Prinsloo J that there would be irreparable harm to the OUTA Respondents if interim relief were not granted.

Alternative remedy

100 The applicants do not address this issue at all in their founding affidavit. This is understandable – given the refusal of the applicants to delay the implementation of e-tolling pending the review, the OUTA Respondents had no choice but to seek an interim interdict. Of course, as it turns out, the applicants did delay its implementation. That, however, only emerged at the end of the hearing of the application for interim relief. And, as this application for leave to appeal demonstrates, the applicants certainly do not accept that the status quo should remain, pending the finalisation of the review. Prinsloo J's order was correct, therefore, since the OUTA Respondents had no alternative remedy available to them.

Conclusion

101 For the reasons set out above, I respectfully submit that it would not be in the interests of justice to grant leave to appeal.

DIRECT APPEAL

102 The applicants submit that "the case warrants a direct appeal to this Court so that the order of the High Court may swiftly and finally be set aside and the underlying issues determined" (Gordhan paragraph 79). For the reasons set out elsewhere in this affidavit, I deny that there is any urgency which justifies a direct appeal to this Court.

URGENCY

103 In the event that this Court sets down the application for leave to appeal or the appeal itself for hearing, the applicants ask that the hearing be convened on an urgent basis.

104 I deny that there is any basis for the urgency relied on by the applicants. The fact of the matter is that SANRAL was not ready to commence e-tolling on 30 April 2012, and is not ready to commence e-tolling now. I refer to what I have stated above in this regard. Mr Gordhan himself states that the Minister of Transport "intends withdrawing the toll tariff determination which was published on 13 April 2012" (Gordhan paragraph 91) and that a new notice will be published after government continues to "engage with the public and to

consult on the draft regulations, the conditions of toll, and the amount of the toll that will be payable" (Gordhan paragraph 92). Mr Gordhan provides no indication as to when that process will be completed.

105 In paragraph 8 of Mr Gordhan's affidavit, he states that "the applicants have endeavoured to avoid the need for this application to be heard on an urgent basis by seeking the first to fourth respondents' agreement to expedite the review proceedings". This overlooks the fact that, at 19h14 on the evening of Thursday 26 April 2012, SANRAL's attorneys sent an email to OUTA's attorneys in which they stated as follows:

> "As a courtesy we are informing you that in the event that a determination, which is adverse to our client, is handed down on Saturday 28 April 2012 we hold instructions to immediately apply for leave to appeal and have briefed senior counsel for this purpose. We are, in the circumstances, and as a courtesy copying your lead counsel on this email.
>
> Should the position change we will advise you immediately."

106 The next day, 27 April 2012, SANRAL's attorney of record informed the OUTA Respondents that it would not be appealing the judgment on Saturday 28 April 2012 should it be against SANRAL.

107 SANRAL did not proceed to apply for leave to appeal after the High Court handed down judgment on Saturday 28 April 2012, presumably because the Minister of Transport had already delayed the commencement of e-tolling. This is entirely inconsistent with the stance now adopted by the applicants in their founding papers to this Court regarding the urgency of the appeal.

108 In any event, there is no truth to the allegation that the OUTA Respondents are intent on delaying the finalisation of the review application. Rather, it is the applicants who have delayed the review to date. I say so for the reasons that follow:

108.1 On 13 April 2012, the legal representatives of the parties held a meeting with the DJP of the North Gauteng High Court in order to obtain directions from him for the further conduct of the matter.

108.2 The meeting followed a letter by the DJP to the parties informing them of the difficulty of constituting a special court to hear the urgent application for the relief sought in Part A on short notice. The DJP requested the parties to come to an arrangement for the responsible further conduct of the matter. I attach hereto the letter from the DJP as "**OUTA8**".

108.3 At the meeting, the parties reported back to the DJP that they were unable to come to an arrangement. The DJP informed the parties that he could assist them by allocating a special judge to hear an expedited review by the end of June 2012. The parties agreed that the review be heard on an expedited basis.

108.4 Because SANRAL refused to undertake not to commence tolling in the interim, the DJP allocated Part A to be heard by the senior urgent court judge for the week of 24 April 2012.

108.5 It was agreed that the parties would approach the DJP for further directions concerning the hearing of the matter depending on the outcome of the urgent application. I attach a joint letter recording the proceedings at the meeting dated 13 April 2012 as "**OUTA9**".

108.6 At the hearing of the application in the High Court, and referring to the above arrangement with the DJP, Treasury and SANRAL repeatedly argued that interim relief should be refused to the OUTA Respondents since no harm would be suffered because the review would be determined finally "*in May*".

108.7 The OUTA Respondents also acknowledged the arrangement for the expedited review but informed the High Court that, given the magnitude of the matter, realistically the proceedings would be finalised in June as was envisaged in the meeting of 13 April 2012.

108.8 The OUTA Respondents also indicated to the court that the respondents had not yet received the record from the applicants who had failed to file the record on 17 April 2012, the deadline prescribed by the Rules of Court.

108.9 This delay by the applicants in filing the record was and remains unexplained.

108.10 The Applicants delayed further:

108.10.1 After judgment had been delivered by the High Court on 28 April 2012, the OUTA Respondents expected and awaited

the expeditious delivery of the record by the applicants in order that the expedited review could be proceeded with.

108.10.2 When the applicants had done nothing by 9 May 2012, the attorney for the OUTA Respondents wrote to the applicants recording that they had failed to file the record timeously on 17 April 2012 or at all and enquiring whether and when the record would be filed. I attach a copy of the letter dated 9 May 2012 as "**OUTA10**".

108.10.3 The attorneys for SANRAL replied on 11 May 2012 and informed our attorney that the record would be delivered on Wednesday 16 May 2012 and proposed a timetable for the hearing of an expedited review "*at the commencement of the next term*", namely, July 2012. I attach a copy of the letter as "**OUTA11**".

108.10.4 The letter called for a reply from the OUTA Respondents by Thursday 17 May 2012.

108.10.5 SANRAL finally delivered "[SANRAL's] Record of Review" on 16 May 2012.

108.10.6 The record filed by SANRAL was lengthy, numbering 5 280 pages, when in the letter dated 11 May 2012 SANRAL had indicated that the HMKL record already in the Respondents'

hands, a document approximately 600 pages in length, constituted "the majority of the record".

108.10.7 Be that as it may, on 17 May 2012, the OUTA Respondents replied to SANRAL's letter confirming that they were committed to an expedited review. They pointed out, however, that in view of the exceedingly long record the proposed eight days for the OUTA Respondents to supplement was unreasonable. The OUTA Respondents suggested that they be allowed 15 days from the date on which they were placed in possession of the full record (including the record from the other applicants) and that the parties should agree to a special timetable in order that the matter could be responsibly dealt with. I attach a copy of the letter from the OUTA Respondents dated 17 May 2012 as "**OUTA12**".

108.10.8 The OUTA Respondents' attorney also immediately wrote letters to the state attorney who represented the Minister of Transport and the Minister of Environmental Affairs and Director-General enquiring when they would deliver their records.

108.10.9 The OUTA Respondents' attorney did so in order that a timetable for an expedited review could in fact be set. It was impossible for the OUTA Respondents to supplement their papers properly without being placed in possession of the full record from all parties.

108.10.10 As with SANRAL, the Minister of Transport, the Minister of Environmental Affairs and the Director-General delayed long past the 17 April 2012 deadline in filing the record.

108.10.11 The State Attorney never responded to the letters written on behalf of the OUTA Respondents enquiring when the record would be filed.

108.10.12 The Minister of Transport and the Minister of Environmental Affairs finally jointly filed a record last Friday 1 June 2012.

108.11 I respectfully submit that the above makes plain that the OUTA Respondents have not been the cause of the delay in the review and have not shown any "intransigence" or tendency to draw out the matter as is misleadingly alleged by the Minister of Finance.

C. CONCLUSION

109 The OUTA Respondents ask that the application be dismissed with costs, including the costs of three counsel.

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DEPONENT

Signed and sworn to before me at on this the day of JUNE 2012, the deponent having acknowledged that he knows and understands the contents of this affidavit, that it is true and correct and that he has no objection to taking of the oath.

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COMMISSIONER OF OATHS