

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' FOURTH AFFIDAVIT

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 Respondent currently residing at 6 Topaz, Lincoln Road, Khyber Rock.
- 2 I am duly authorised to oppose the 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 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 Jammie, Director and Chief Economist at Econometrix (Pty) Ltd, whose unsigned confirmatory affidavit is attached as "RA1". Dr Jammie is out of the country as at the date of signature of this affidavit and as such his signed confirmatory affidavit will be filed as soon as possible when Dr Jammie returns to South Africa; and

4.2 Christopher Hart, Economist and Chief Strategist at Investment Solutions, whose confirmatory affidavit is attached hereto as “**RA2**”.

PURPOSE OF THIS AFFIDAVIT: TO RESPOND TO NEW MATTER

5 On 7 June 2012, a “Replying Affidavit in terms of Rule 11(3)(b)” (“the replying affidavit”) was filed under a filing notice signed by the State Attorney.

6 The replying affidavit was filed after this Court had, on 6 June 2012, given directions that the application for leave to appeal would be heard on 15 August 2012.

7 The replying affidavit was deposed to by the Minister of Finance, the Honourable Pravin Gordhan, who identifies himself as the deponent of the founding affidavit for National Treasury and the further applicants.

8 On 18 June 2012, our attorneys addressed a letter to the state attorney and to Werksmans Attorneys, the instructing attorneys for the Applicants other than the National Treasury. The purpose of the letter, which is annexed to this affidavit as “**RA3**”, was to enquire whether any of the other Applicants would separately be filing further affidavits, so as to ensure that the OUTA respondents would not have to seek leave to file a multiplicity of affidavits in response to affidavits filed subsequently by each of the Applicants.

- 9 The letter asked for a response to this question by 16h00 on Thursday 21 June 2012, failing which it would be assumed that no further affidavits would be forthcoming. No response was received to the letter, and so it is assumed that no further affidavits are to be filed.

- 10 While the replying affidavit is said to be confined to “salient features only of the answer, of particular relevance to Treasury”, the substance of the reply extends also to the case for the other Applicants, especially SANRAL.

- 11 Following substance and not form, and in view of the fact that no separate replying affidavits were filed, it will be assumed that the replying affidavit is deposed to on behalf of all of the Applicants.

- 12 In the replying affidavit, the Applicants introduced new matter in order to supplement the case made out in the founding and supporting affidavits.

- 13 I am advised and I respectfully submit that the replying affidavit of the Applicants is irregular because
 - 13.1 in terms of Rule 19, the final affidavit filed in applications for leave to appeal to the Court is the answering affidavit of the respondent. The Applicants should at the very least sought leave to file the replying affidavit; and

 - 13.2 it is not permissible to introduce new matter in a replying affidavit.

14 The OUTA respondents file this fourth affidavit in order to deal with the new matter in the Applicants' irregular replying affidavit.

15 The OUTA respondents pray that the Court receive this fourth affidavit in the interests of justice and in order that the OUTA respondents are not prejudiced by the unanswered material allegations in the replying affidavit that constitute new matter.

THE INTERIM ORDER IS NOT AN INTERFERENCE WITH THE “POLICY CHOICES” OF THE CABINET AND THE “PLANNED REVENUE RAISING “OF GOVERNMENT”

16 It is not true that the interim order constitutes an interference with the policy choices of Cabinet and the planned revenue raising of Government.

17 The toll declarations challenged by the OUTA respondents were made by SANRAL in terms of section 27 of the SANRAL Act who

17.1 in terms of section 25 of the Act “is responsible for the financing of all [planning, construction, maintenance and rehabilitation of national roads] in accordance with its business and financial plan”; and

17.2 in terms of section 30 of the Act is provided by the Legislature with a range of funding sources.

- 18 Moreover, SANRAL's decision to declare Gauteng's freeways to be toll roads for the purposes of e-tolling and to proceed with the steps prescribed by legislation was a decision made and approved by the Board of SANRAL two months before Cabinet was approached to "approve" e-tolling in July 2007.
- 19 I attach a copy of the memorandum dated 24 May 2007 sent by SANRAL's CEO, Nazir Alli, to the SANRAL Board requesting that the Board approve:

"THE PROPOSED OPEN ROAD TOLLING STRATEGY FOR TOLLING THE NATIONAL AND PROVINCIAL FREEWAYS OF GAUTENG, AS DESCRIBED IN [THE] MEMORANDUM.

THE PROPOSED INSTITUTIONAL MODEL FOR THE IMPLEMENTATION OF THE PROJECT.

THAT SANRAL MAY APPROACH THE MINISTER OF TRANSPORT TO DECLARE THE PROVINCIAL FREEWAYS NATIONAL ROADS.

THAT SANRAL MAY EMBARK ON THE LEGALLY PRESCRIBED PUBLIC PARTICIPATION PROCESS REGARDING THE PROPOSED TOLL SCHEME.

THAT SANRAL MAY THEN APPROACH THE MINISTER OF TRANSPORT TO DECLARE THE RELEVANT ROADS TOLL ROADS."

- 20 As appears from the first page of annexure “**RA4**”, the Board gave approval on 29 May 2007.
- 21 Pages 23 to 29 of the memorandum at “RA4” moreover make clear that SANRAL would fund the project with loans obtained from the capital market and then repay such loans with toll revenue received, for instance:
- 21.1 at page 23: *“the real interest rates are based upon the real interest rates that SANRAL is expected to pay on its capital and money market debt, with a more conservative approach in respect of the period after 2009/2010”*;
- 21.2 at page 24: *“Table 10-2: Debt Service Cover Ratios and Loan Repayment Information”*;
- 21.3 at page 28: *“A maximum debt level of R 27.6 billion is predicted to occur at the end of the 2020/2021 financial year”*.
- 22 Treasury’s interest in the present proceedings arises because it has a contingent obligation as guarantor of SANRAL’s debt (for which it should have made provision), not by virtue of interference with Cabinet and Government “policy choices” or decisions about “revenue raising” mechanisms.
- 23 The application before the High Court, the judgment by Prinsloo J in Part A and the pending review proceedings do not seek to interfere with or set aside this policy.

24 The challenge of the OUTA respondents is that the toll declarations, together with the Minister of Transport's approvals for such declarations, made in terms of section 27 (1) read with section 27(4) of the Act are liable to be reviewed and set aside because:

24.1 mandatory procedures prescribed by legislation were not followed; and

24.2 material facts were omitted or not taken into account;

24.3 the above administrative action was irrational and/or so disproportionate that it was not open to the Minister of Transport to approve, and to SANRAL to declare, Gauteng's freeways to be toll roads.

25 The OUTA respondents also challenge the granting of environmental authorisations in terms of NEMA, which likewise has nothing to do with Treasury, still less "policy choices" and "revenue raising" by Cabinet and Government.

THE EFFECT OF A MARGINAL RAISE IN THE FUEL LEVY WILL BE NEGLIGIBLE

26 The replying affidavit also makes a series of new material allegations under the heading of "No irreparable harm?".

27 The first group of these include the following related allegations:

- 27.1 that the overall burden of GFIP toll revenue on South African taxpayers is moderate by comparison to the burden of other taxes;
- 27.2 that a marginal raise in a tax such as the fuel levy
 - 27.2.1 will have an “economic distorting effect on the allocation of resources and expenditure patterns of households associated with its price and income effects”; and
 - 27.2.2 will have “a resulting impact on transport costs and resulting shifts in consumption and production choices across the entire economy, including parts of the country where there are far fewer transport options to individuals or businesses than in Gauteng”;
- 27.3 that if the order by Prinsloo J is not discharged, then Government will “unavoidably” have to consider both alternative national taxes or charges “such as a substantial increase in the fuel levy” thus “bearing down” on the national population “with direct or indirect impact on the very poor”;
- 27.4 that the loss of revenue on account of the interim order could have material consequences for all South Africans while GFIP is a project within “the Gauteng province only”.

28 I am advised and I respectfully state in response that

- 28.1 the temporary or long term economic effect of an increase in the fuel levy required to service the GFIP debt is negligible;
 - 28.2 such effect will be negligible in comparison to the effect that e-tolling will have;
 - 28.3 e-tolling will itself, like the raising of a general tax, impact all South Africans, including the poor, in other parts of the country.
- 29 In this regard, I am informed by the expert Chris Hart that:
- 29.1 the raise of the fuel levy will have an impact on inflation but at 11 cents the impact will be minimal;
 - 29.2 the weight of petrol and the CPI basket is 3.93% and an 11 cents increase in the price of fuel is around 1%;
 - 29.3 1% on 3.93% has a less than 0.04% impact on the inflation rate and even with multipliers would be less than 0.1%;
 - 29.4 Government was clearly unconcerned over the impact on inflation of the 28 cents per litre increase imposed in the budget in the beginning of 2012. This is a multiple of 11 cents;
 - 29.5 the effects of the e-toll would be greater for a number of reasons:
 - 29.5.1 the system is far more expensive than a fuel levy, which would consequently have a greater effect on inflation;

29.5.2 while commuters might have a monthly cap on the toll, this does not appear to apply to the goods and services traffic. This category of road users would raise the cost of doing business at the centre of the SA economy, which would have a stronger multiplier for the economy as a whole;

29.5.3 the cost increase in Gauteng, which has the potential to raise Gauteng inflation rate by a much greater factor (possibly more than 0.5%), will quickly filter into the national inflation rate, given that Gauteng is the price setting centre of the South African economy;

29.5.4 collection inefficiencies and leakages would further raise costs on compliant road users.

30 The expert, Azar Jammine, echoes Hart, informing that:

30.1 a marginal increase in the fuel levy may have a distorting effect on the economy, but this applies to all forms of taxation;

30.2 the effect of e-tolling will itself have a distortive effect across the whole economy given that Gauteng is the industrial hub of the country;

30.3 the impact of an increase in the fuel levy will, to all intents and purposes, be negligible:

30.3.1 the repayment of a figure of R2.5 billion per annum would amount to adding no more than 5.85% onto the current fuel

levy. Given that the levy amounts to R1.975 per litre, it implies that the full cost of the servicing requirement of SANRAL could be financed by increasing the fuel levy by no more than 11 cents per litre;

30.3.2 on a total cost of petrol of 12.75 per litre, this would amount to an increase in the petrol price of just 0.9%, or R4.50 on a cost of replenishing a full tank of petrol at R500;

30.3.3 furthermore, with a weighting of 3.93% within the overall CPI, this would add no more than 0.04% to the headline inflation rate, which was 6.12% in April. In other words, the direct impact would be to lift the inflation rate from 6.12% to 6.16%;

30.3.4 An alternative way of looking at this is that this would erode households' disposable income by around 0.04%, i.e. 40 cents for every R1000 of income. To all intents and purposes, the impact would therefore be virtually negligible;

30.3.5 An alternative way of looking at this is that R2.5 billion amounts to no more than 0.08% of current GDP and a slightly larger 0.15% of household consumption expenditure;

30.3.6 the above calculations are based on what Jammie believes, on account of his exposure to and consulting on GFIP mentioned in the answering affidavit, is the realistic forecast of

an annual revenue collection from e-tolls of R2.5 billion to be replaced.

31 I respectfully submit that on the basis of the foregoing, it is clear that the new allegations made by Gordhan on behalf of the Applicants about the effect of resorting to an increase in the fuel levy are inaccurate and should be rejected.

32 The effect of such increase, whether in the interim or long term, will be very small.

33 What is more, the recent rise and fall in the fuel price of multiples of 11 cents would mean that that a marginal rise of 11 cents will effectively not be felt at all.

34 The experts also make clear that the suggestion on behalf of the Applicants that tolling will be geographically limited in economic effect to Gauteng and not burden all South Africans or the poor is likewise inaccurate and should be rejected.

35 The increase of costs in Gauteng as a consequence of e-tolling will cause an increase in the cost of living nationally. Plainly, not only Gauteng's road users but all South Africans will bear the cost of e-tolling.

36 Moreover, notwithstanding the exemption of public transport carriers (if the promises of SANRAL and Government are kept), the poor will still suffer the

impact of e-tolling because the prices of food and other consumer goods will rise.

THE REPLYING AFFIDAVIT ONLY SERVES TO UNDERMINE "IRREPARABLE HARM" EVEN FURTHER

37 The second group of new material allegations in replying affidavit on the subject of irreparable harm are to the effect that Government cannot bear the cost of carrying SANRAL's GFIP debts pending the review as this will thwart Treasury's plans to stabilise and reduce national debt.

38 I am advised and I respectfully state that these allegations also fall to be rejected.

39 According to the Applicants

39.1 the review will be heard "late this year"; and

39.2 the appeals process will ensure that no final determination will arise in respect of the review "before the end of 2013". (The prediction by the Applicants in the founding affidavit was that the appeals would be finalised in 2013, or "potentially" 2014.)

40 With the Applicants unable to establish that SANRAL was, is, or even will be ready to commence e-tolling before August 2012, the net effect of the above allegation is that, on the Applicants' version, Government may have to service

SANRAL's GFIP debts for one and a half, or at most two years, only part of which is on account of the interim order. (I pause to state that the OUTA respondents disagree. The interim order will lapse upon the determination of the review later this year.)

41 In other words, on the Applicants' version, SANRAL's GFIP debts may have to be funded either by Treasury or by an alternative revenue raising mechanism for a period of 18 to 24 months.

42 Should the GFIP debts be funded with revenue raised from an alternative funding mechanism such as the fuel levy contemplated by the Applicants in the replying affidavit, there will be no effect on national debt levels at all since

42.1 SANRAL's debt will remain a SANRAL debt on SANRAL's balance sheet; notwithstanding that

42.2 it is serviced from revenues derived from a general revenue raising mechanism.

43 In this regard, the expert Hart cautions that the Applicants continually obfuscate the debts of SANRAL that are on SANRAL's balance sheet with the debts of Government on Government's balance sheet.

- 44 In addition, it has already been made clear that should resort be had to an alternative mechanism such as the fuel levy, the economic effect will be negligible and the effect felt by South Africans will be even less.
- 45 It is only if Treasury decide to fund SANRAL's GFIP debts from the central fiscus that the Government's debt levels are affected at all.
- 46 Given the Applicants' own forecasts, should Treasury decide to fund SANRAL's GFIP debts from the central fiscus, Treasury can do so by means of a modest incursion into the budgeted contingency of 5.81 billion for the present financial year and an even more modest incursion into the budgeted contingency of R 11.884 billion for the following financial year.
- 47 There would, in that event, be no impact on the Treasury's plans to erode the national fiscal deficit.
- 48 If, however, Treasury elected to source the funds from elsewhere in the fiscus (that is not from the budgeted contingencies), the additional debt would add to South Africa's debt, but such addition will be negligible in the context of Government's finances and on Treasury's plans to erode national fiscal debt.
- 49 In this regard

- 49.1 Hart, informs that the financing obligation on SANRAL's debt, if it is still R20 billion, is less than 0.2% of government's annual expenditure, a mere rounding error in the broader scheme of government finances;
- 49.2 Hart informs further that the entire GFIP debt, if it is still R20 billion, is approximately 0.7% of GDP, another rounding error in Government finance, with servicing obligations less than one tenth of that;
- 49.3 Jamine in similar vein informs the deficit implied by financing GFIP on the Government's balance sheet itself would be less than 0.1% of GDP, an insignificant amount.
- 50 It is clear, in addition, that the actual impact of assumption of SANRAL's GFIP debt by Treasury in the interim will, in fact, be less than that spelt out by the above experts.
- 51 This is because, as Hart qualifies, the debt should no longer be R20 billion because of the injection of R 5.75 billion.
- 52 The Applicants have not taken the Court into their confidence by disclosing the true impact of the R 5.75 billion appropriation on SANRAL's GFIP debt obligations.

53 In point of fact, despite that the facts are within the knowledge of SANRAL and Treasury, the Applicants have not informed the Court of what SANRAL's debts in relation to GFIP are.

54 The Court has only been informed that SANRAL will forego approximately R270 million per month in revenue (a convenient and unexplained leap up from the R225 million figure stated by Alli on oath before the High Court).

55 I am advised and I submit that, plainly, what is relevant in the context of the present application is not what revenue will be lost, but the precise amount of SANRAL's GFIP debts and debt servicing obligations in the interim.

56 I am advised and I submit further that in this regard, the injection of R 5.75 billion clearly must have reduced the capital debt and therefore the repayment obligations of SANRAL.

THE NEW PROJECTION OF THE QUANTUM OF TOLL REVENUE TO BE COLLECTED AND THE COSTS OF COLLECTION

57 I specifically record the OUTA respondents' denial of the correctness of the projection by "SANRAL and National Treasury" recorded in paragraph 11.

58 SANRAL and Treasury do not set out any proper and detailed basis for these newly made projections.

59 Regarding the assumption of 93% compliance,

59.1 the consulting engineers in the GFIP toll feasibility studies as well as the GFIP Steering Committee have warned that toll non-compliance will be higher in South Africa than in other countries.

59.2 I attach an excerpt from the report of the former hereto as "**RA5**".

59.3 SANRAL and Treasury cannot with any reliability assume a compliance rate equal to the international average of 93%.

60 Similarly, I am advised and I respectfully state that given the absence or, at best, inadequacy of SANRAL's planned enforcement mechanisms (in terms of which SANRAL plans to use ordinary civil processes to enforce GFIP collection) SANRAL and Treasury are unable to make any reliable assumptions on the success rate of collection from non-compliant users.

61 SANRAL and Treasury do not provide the Court with any basis for the assumption of 40% success in enforcement either.

62 Further reasons why the new SANRAL and Treasury projection falls to be rejected are contained in the OUTA respondents' answering affidavit at paragraph 83 and therefore will not be repeated here.

THE REVIEW WILL BE FINALISED IN SEPTEMBER UNLESS DELAYED FURTHER BY THE APPLICANTS

63 I am advised and I respectfully state that the review will be finalised in late August or September 2012 unless delayed by the Applicants.

64 I attach a letter sent by the OUTA respondents to the Applicants dated 8 June 2012 hereto as "**RA6**".

65 In the letter, the OUTA respondents

65.1 required the outstanding portions of the record to be delivered by 12 June 2012 (as at 8 June 2012, the Minister of Transport, Minister of Water and Environmental Affairs and Director-General had still not filed the record); and

65.2 committed themselves to "file supplementary papers within 15 days after the receipt of the above (or such shorter period as counsel are able to manage) notwithstanding the length of the record".

66 The OUTA respondents also informed the parties that, in accordance with the mutual commitment to an expedited review described in the answering affidavit, the OUTA respondents would be in contact regarding a meeting with the Deputy Judge President at which meeting the OUTA respondents will request "*an expedited date for the hearing and seek an expedited timetable for the filing*

of any affidavits outstanding at the time of the meeting and the filing of heads of argument".

67 I am advised that in view of the hearing of the Constitutional Court application for leave to appeal in mid-August, it is likely that the earliest the review will be heard will be thereafter in late August or in September.

68 The OUTA respondents intend keeping by their commitment to the hearing of an expedited review. The only reason that such review will not proceed with due expedition will be if the Applicants resort to delaying tactics and delay the hearing of the review further in an attempt to strengthen their position before this Court.

69 The Court will be informed of the progress made by the OUTA respondents in filing affidavits and of the dates set for the hearing at the application for leave to appeal on 15 August 2012.

CONCLUSION

70 For the above reasons and the reasons stated in the OUTA respondents' answering affidavit, I ask that the application be dismissed with costs, including the costs of three counsel.

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.

COMMISSIONER OF OATHS