

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(JOHANNESBURG)**

Case No.

In the matter between:

NATIONAL TREASURY

First Applicant

**THE SOUTH AFRICAN NATIONAL
ROADS AGENCY LTD**

Second Applicant

**THE MINISTER, DEPARTMENT OF
TRANSPORT REPUBLIC OF SOUTH AFRICA**

Third Applicant

**THE MEC, DEPARTMENT OF ROADS
AND TRANSPORT, GAUTENG**

Fourth Applicant

**THE MINISTER, DEPARTMENT OF WATER
AND ENVIRONMENTAL AFFAIRS**

Fifth Applicant

**THE DIRECTOR-GENERAL, DEPARTMENT OF
WATER AND ENVIRONMENTAL AFFAIRS**

Sixth Applicant

and

OPPOSITION TO URBAN TOLLING ALLIANCE

First Respondent

**SOUTH AFRICAN VEHICLE RENTING
AND LEASING ASSOCIATION**

Second Respondent

**QUADPARA ASSOCIATION
OF SOUTH AFRICA**

Third Respondent

**SOUTH AFRICAN NATIONAL
CONSUMER UNION**

Fourth Respondent

NATIONAL CONSUMER COMMISSION

Fifth Respondent

REPLYING AFFIDAVIT

I, the undersigned

NAZIR ALLI

do hereby make oath and state:

- 1 I am the Chief Executive Officer of the South African National Roads Agency Limited, duly employed as such at 48 Tambotie Avenue, Val de Grace, Pretoria.
- 2 The facts contained in this affidavit are within my own knowledge and are, to the best of my belief, both true and correct.
- 3 Where I depose to allegations of a legal nature I rely on the advice of SANRAL's legal representatives.
- 4 For convenience, I use the same defined terms as appear in the founding affidavit, here.

5 I deposed to an affidavit on behalf of SANRAL which was filed in support of this application for leave to appeal.

6 The first to fourth respondents filed an answering affidavit on 4 June 2012. I have read that affidavit and although the Rules of this Court do not permit a party as of right to file a replying affidavit in an application for leave to appeal, there are certain new averments in the respondents' answering affidavit which are incorrect and require a response from SANRAL. In addition, SANRAL wishes to place before this Court the information it has been able to obtain as a consequence of running the toll gantries during the period of June 2012 as this is critically relevant to the prejudice which the respondents claimed would be suffered by the members of the public if the interdict was not granted. As a result, SANRAL respectfully requests leave to file this affidavit. I submit that the respondents cannot be prejudiced by the receipt of this affidavit because it will be filed well in advance of the hearing, includes information which was only obtained in June 2012, and simply seeks to set straight certain factual inaccuracies in the answering affidavit.

- 7 At paragraph 64 of the respondents' answering affidavit, they claim that SANRAL is obliged by law to ring-fence toll revenue schemes because cross-subsidisation from one toll scheme to another or non-toll road scheme is impermissible.
- 8 Although it is correct that in terms of section 34(3) of the SANRAL Act, SANRAL is obliged to "keep separate accounts of all monies received as toll or otherwise in connection with toll roads", it is incorrect that SANRAL is obliged to ring-fence the revenue received from different toll schemes. There is no prohibition on cross-subsidisation between toll schemes under the SANRAL Act.

The costs of tolling

- 9 At paragraph 62.2 of the respondents' answering affidavit, Dr Jammie contends that the annual revenue budget of R6.75 billion referred to in the founding affidavit of Mr Gordhan is inconsistent with the R3.73 billion annual revenue figure which he extrapolates from annexure NA1 to my affidavit.

10 Dr Jammie is correct that SANRAL's annual expected revenue from tolling is R3.73 billion and not R6.75 billion. This is because the figure of R6.75 billion which appeared in Mr Gordhan's founding affidavit included within it the revenue which would be received by the three concessionaires which have been granted the operations and maintenance of the N3 Heidelberg to Cedara, the N1/N4 West Platinum from Pretoria to Botswana border and the N4 East Maputo Development Corridor from Pretoria to Maputo. As a result, there is in fact no inconsistency between what is stated by Mr Gordhan in the founding affidavit and what is reflected in annexure NA1 to my affidavit.

11 While I am dealing with annexure NA1, it is necessary for me to point out that subsequent to filing my affidavit, it has been brought to my attention that there was an error in the interest calculation reflected in the table which appears in annexure NA1. That error was the result of certain double counting of interest. When the error is corrected, although the interest amount and the consequent total expenditure amounts decrease to R 71 395.74 million, the expected operating expenditure figures of R 12,170.13 million and R 6,194.06 million

remain the same. I therefore attach a revised copy of annexure NA1 to this affidavit which I will mark as annexure “**NA1A**”. That annexure reflects the corrected interests calculations, as well as the total cost figures for the project.

12 The respondents are accordingly incorrect when they state, at paragraph 83.10 of their answering affidavit, that the cost of toll collection will in fact be R33.4 billion over 20 years. This figure was derived by the respondents from a simplistic calculation based on the amount stated in the contract attached as annexure OUTA6 to their answering affidavit. What the respondents did to arrive at their extraordinary figure of R33.4 billion for toll collection costs, is they took the figure of R8.3 billion (reflected in OUTA6) and divided that by the alleged 5 year term of the contract to arrive at an annual toll collection figure of R1.67 billion. From there, the respondents multiplied R1.67 billion by the 20 year period of the loan and arrived at the total toll collection figure of R33.4 billion.

13 This simplistic calculation is fundamentally flawed for a number of reasons.

- 13.1 First, the contract attached as OUTA6 in fact applies over a series of phases of the project. The first, design and build phase was intended to operate for the first eighteen months of the project and accounts for an initial R.1.6 billion of the total contract, which constitutes an upfront capex cost.
- 13.2 After this initial phase, the contract is divided into 5 and 8 year phases in which, under the five year phase, the operating costs for TCH and VPC are calculated and, under the eight year phase, certain systems and staffing infrastructure costs are calculated. It was therefore wholly incorrect for the respondents to have simply divided the total figure of R8.3 billion by 5 and arrived at an annual, constant figure of R 1.67 billion for toll collection costs. At a minimum, the initial capex cost ought to have been subtracted from the total figure of R8.3 billion and then a portion of the balance ought to have been divided over the 5 year period for certain aspects of the operation of the toll collection system and over 8 years for other aspects.
- 13.3 In addition to this, and in fact more fundamentally, the calculation performed by the respondents does not take account of the bill

of quantities basis upon which the contract was advertised and tendered for.

13.4 The contract figure is arrived at on the basis of certain conservative projections about maximum likely costs arising from the system of toll collection but, as is always the case with bill of quantities contracts, as efficiencies develop in the system, the actual amount payable to the contractor diminishes. Therefore, the maximum cost of R8.3 billion is unlikely ever to be paid out to the contractor as efficiencies develop in the toll collection system. The respondents' calculation is therefore fundamentally flawed because it does not take account of the "add measure" nature of the contract which effectively means that contractor is not paid a fixed amount but is rather paid on work actually done in terms of a bill of quantities. This, in turn, leads to the cost of toll collection reducing when it reaches a "steady state" as a result of compliance which brings about efficiencies in the system.

13.5 The final factor which is not taken into account by the respondents' simplistic calculation is the fact that included within

the R8.3 billion contract figure are certain provisional sums for ancillary items such as bank charges. The provisional sums component of the total contract figure is R 2,65 billion.

13.6 As it so happens, the banking charges aspect of the provisional sums figure went out to tender recently and was awarded to a bidder who tendered at a figure which was half of the figure which SANRAL projected in the provisional sums. This has resulted in a significant decrease to the total costs payable for this aspect of the contract. It is therefore clear that the projected cost of R8.3 billion will never in fact be paid on the contract because there has already been a substantial saving in the form of the banking charges which were conservatively estimated at the time of tendering and which have now been substantially reduced by the competitive terms on which the successful tenderer bid.

14 Therefore, contrary to the simplistic and patently incorrect figures put up by the respondents for the costs of toll collection, the correct toll collection figures are those stated in the annexure NA1A.

- 15 It is furthermore surprising that the respondents contend in their answering affidavit that SANRAL has tried to hide the true costs of toll collection from them and the public (see paragraphs 83.4.2 and 83.4.3 of the answering affidavit) when they know full well that SANRAL in fact attempted to place these very figures before the High Court during the hearing and the respondents successfully opposed its application to admit the evidence which appeared in Annexure NA1 to my supporting affidavit and which is now contained in the slightly revised Annexure NA1A.
- 16 The respondents have also fundamentally misunderstood the contents of OUTA8 which they attach to their answering affidavit and it is necessary to correct their confusion.
- 17 OUTA8 contains SANRAL's projected costing for the tolling system as at January 2012.
- 18 From this annexure, the respondents derive four conclusions. They claim that:

- 18.1 The toll costs for 2013 are R1,1221 billion while the projected revenue to be collected in the same period will be only R1,084 billion;
- 18.2 The projected toll costs for 2014 are R1,421 billion while the projected toll revenue to be collected will be R2,4945 billion;
- 18.3 The toll costs will increase and not decrease over time; and
- 18.4 The toll costs are therefore either fixed, or if variable, will increase as toll collection increases.
- 19 Not one of these propositions is correct.
- 20 First, the conclusions drawn by the respondents relate to calendar years whereas OUTA8 deals with financial years. This error is significant because the toll collection costs operate on a bell curve. This means that the initial ramp up costs which must be incurred to put the system in place diminish once the system is operational. These initial ramp up costs include costs associated with staffing at full capacity the kiosks from which e-tag purchases and registration must be completed and the call centre operations. Thus, for example,

the 2014 financial year has nine months of it in the calendar year of 2013 and thus reflects a phase of the bell curve in which initial costs are still high and only begin to diminish significantly in the first few months of the 2014 financial year.

21 Secondly, to appreciate the full impact of the bell curve on these projected costs it is useful to consider the costs for 2015 which were not included in OUTA8 but which I can indicate are as follows:

21.1 The projected costs of toll collection for the 2015 financial year are R591,79 million;

21.2 The projected revenue for the same period is R2 799 million.

22 The substantial increase in revenue and decrease in toll collection costs in this period is a product, first, of the initially high ramp up costs no longer being incurred in the system and secondly, the assumed reduction in non-compliance ratios as the system takes effect.

23 Finally, these facts completely undermine the respondents' claims that toll collection costs increase over time. As the bell curve distribution makes plain, this is simply incorrect and in any event

cannot be derived from any sensible reading of the contents of annexure “OUTA8”.

Running the gantries

24 During the month of June 2012, SANRAL activated the tolling system in order to perform a dry run of the tolling infrastructure and to obtain practical information about the usage of the toll roads and the likely operating costs of the system. The mere fact that this dry run has taken place and has enabled detailed recording assessments to be made of the current usage of the toll roads, completely undermines the respondents’ suggestion that SANRAL was not and is not ready to commence tolling. It was ready and has been running the system for a month.

25 In addition, this dry run has provided critical information which shows that the respondents’ claim that “persons on the margin of poverty will be forced to pay significant amounts of money in order to use the roads upon which they rely for their survival” (see paragraph 97.3 of the answering affidavit) is incorrect.

26 As a matter of fact, the records for June 2012 show that 91% of the users of the toll roads will pay less than R200 per month in tolls and less than 0,2% of users will reach the maximum cap of R550 per month. These users in the 0,2% maximum cap category will, however, experience the greatest benefits from the system given how often they use the roads.

WHEREFORE I persist in seeking the relief set out in the notice of motion to which the applicants' founding affidavit was attached.

NAZIR ALLI

I certify that this affidavit was signed and sworn to before me at _____ on this the _____ day of July 2012 by the deponent who acknowledged that she knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on her conscience and uttered the following words: 'I swear that the contents of this affidavit are both true and correct, so help me God.'

COMMISSIONER OF OATHS

Name:

Address:

Capacity